

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6272

SAMUEL ED ROBINSON,

*Petitioner,*

—v.—

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SIXTH CIRCUIT

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
SOUTHERN DIVISION**

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Civil Action No. 5887

Jurisdiction of the Court Is Invoked Under Title 28,  
U.S. C.A., Section 2241 (3).

**SAMUEL ED ROBINSON, PETITIONER**

**VS.**

**WILLIAM S. NEIL, Warden Tennessee State Prison  
Nashville, Tennessee, RESPONDENT**

**PETITION FOR WRIT OF HABEAS CORPUS—  
Filed April 30, 1970**

The petitioner, Samuel Ed Robinson, petitions the Court for a writ of habeas corpus, pursuant Title 28, U.S.C.A., Section 2241 (3):

**1.**

The petitioner was indicted by the Grand Jury of Hamilton County, Tennessee, for three counts of assault with intent to commit first degree murder. Upon trial of the indictments, October 4, 1962, the petitioner entered guilty pleas to all three charges with the understanding the sentences would be served concurrently. This agreement was not kept and petitioner was sentenced from not less than three nor more than ten years on the first charge. Three to five years on the second charge; and from three to ten years on the third charge. The sentences were ordered to be served consecutively.

**2.**

Prior to petitioner's trial in the Hamilton County Criminal Court on these indictments, he was placed on trial in the City Court of Chattanooga, Tennessee, and

fine fifty (\$50.00) dollars on each of the charges he was tried for in the criminal court. Therefore the petitioner was placed twice in jeopardy for the same offense in violation of the *Double Jeopardy* provision of the *Fifth Amendment to the Constitution of the United States*.

The Supreme Court of the United States held on April 6, 1970, that the double jeopardy provision of the Fifth Amendment to the United States Constitution forbids trying a person in a municipal court and in a state court also. *Joseph Waller, Jr. vs. State of Florida*, 90 S.Ct. \_\_\_\_\_. Petitioner's case falls squarely within the decision of *Joseph Waller, Jr. vs. State of Florida*, *Supra*. The judgment and sentences therefore are void in toto and petitioner is entitled to immediate discharge from this unlawful imprisonment.

## 3.

Petitioner has exhausted the remedies in the courts of Tennessee by obtaining a decision on his constitutional question from the Criminal Court of Hamilton County and by the Supreme Court of Tennessee. This same identical question was presented to this Court by writ of habeas corpus which was denied and affirmed by the Court of Appeals for the Sixth Circuit. Therefore the provisions of Title 28, U.S.C.A., section 2254.

Premises considered, petitioner prays that he be granted a speedy hearing on his petition for habeas corpus, and after hearing the proof that he be discharged from this illegal confinement.

Respectfully Submitted,

/s/ Samuel Ed Robinson  
SAMUEL ED ROBINSON  
petitioner



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE,  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs

WILLIAM S. NEIL, Warden Tennessee State Penitentiary

ANSWER OF RESPONDENT

The respondent for answer to the petition filed herein  
says:

I.

He admits the convictions of the petitioner as set out, but denies any form of agreement as to the concurrence of the sentences imposed, and demands strict proof thereof if material.

II.

He admits that the occurrence which gave rise to the present convictions in the State cases was the same for which petitioner was convicted in the municipal court of Chattanooga, Hamilton County, Tennessee.

He admits that the offense of assault and battery is a lesser included offense of the crime of Felonious Assault, with intent to commit murder.

III.

The only question presented by this petition is whether this Court should apply the holding of the *Waller v. Florida*, 38 L. W. 4263 (April 6, 1970) retrospectively. Respondent denies that such action should be taken in view of the criteria for such as laid down in *Linkletter v. Walker*, 395 U. S. 1731 and in many cases since that opinion was handed down, as set out in the brief filed herewith.

/s/ Edward E. Davis  
EDWARD E. DAVIS  
District Attorney General  
For Respondent

[Certificate of Service (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE,  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs

WILLIAM S. NEIL, Warden Tennessee State Penitentiary

BRIEF OF RESPONDENT

Since the only question presented by the petition filed herein, and the response thereto is one of law this brief is being filed with the response to set forth the position of respondent on the question.

Question: Should the holding of the United States Supreme Court in the case of *Waller v. Florida*, S. Ct. —, —, (April 6, 1970) be given retrospective application?

Respondent submits to this Court that it should not. Beginning with the statement of the Court in *Linkletter v. Walker*, 85 S. Ct. 1731, on page 1737 that:

"However, we believe that the constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, "We think the Federal Constitution has no voice upon the subject."

we find that such retroactive application is not a matter of right, but rather one course of action which the Courts *may* take where the 'exigencies of the situation require such application.' (*Johnson v. New Jersey*, 86 S. Ct. 1772.)

In 1967 the Court laid down the controlling criteria guiding resolution of the question here presented as being:

- (a) the purpose to be served by the new standards
- (b) the extent of the reliance by law enforcement authorities on the old standards, and
- (c) the effect on the administration of justice of a retroactive application of the new standards.

See: *Stovall v. Denno* 87 S. Ct. 1967

In the 1969 case of *Desist v. U. S.* 89 S. Ct. 1030 the Court reaffirmed the above criteria and said, on page 1033

"Foremost among these factors is the purpose to be served by the new constitutional rule."

Applying the reasoning of the Court in *Desist, supra*, to the present case as it relates to the purpose to be served by the new rule enunciated in *Waller*, it seems a fair statement that the purpose of the new rule is to abandon and abolish the long-held 'dual sovereignty' theory of the state—municipal governmental relationships. That this purpose has been accomplished is incontrovertable. Without a doubt, given sufficient reasonable time, every State which has embraced such theory, as well as the Federal system which has in the past approved it, will take the necessary steps to do away with this newly discovered evil in the administration of justice.

As to the (b) part of the criteria set out above one needs but to review the past decisions of many State Courts, and the Federal Courts as set out in an opinion of this Court filed on May 15, 1967 in the case of *Samuel Ed Robinson v. C. Murray Henderson*, Civil Action No. 4954.

Since law enforcement authorities have for so long relied on the great weight of judicial authority contrary to the rule laid down in *Waller* it is virtually impossible to assess with a reasonable degree of accuracy what impact on the administration of our Tennessee criminal laws a retroactive application of *Waller* would have. That impact would however be tremendous. Respondent will attempt to furnish the Court at the hearing the statistics in support of this contention.

The heart of the problem of whether a new constitutional rule is to be given retroactive application or not, i.e. has the violation thereof materially affected the fact-finding and truth-determining processes of the trial, has been obviated in the present case by the defendants

voluntary pleas of guilty. (See attached certified copies of the judgments of conviction.)

It is therefore urged upon this Court that consideration of the factors of purpose, reliance on the old rule and burden on the administration of justice in the State of Tennessee are entitled to such overriding significance as to deny retroactive application of the rule laid down in *Waller*.

Respectfully Submitted

/s/ Edward E. Davis  
EDWARD E. DAVIS  
District Attorney General  
For Respondent

[Certificate of Service (Omitted in Printing)]

## JUDGMENT

IN THE CRIMINAL COURT  
OF HAMILTON COUNTY, TENNESSEE  
DIVISION II

October 4, 1962

Court met pursuant to adjournment, present and presiding the Honorable Tillman Grant, Judge, etc., when the following proceedings were had, to-wit:

\* \* \* \*

103812

STATE v. SAMUEL ED ROBINSON—Felonious Assault

Came the Attorney General and the defendant in person, and this case came on for trial on the defendant's plea of guilty to the offense of Assault With Intent to Commit Murder in the First Degree before the Court and the following jury, to-wit: Mrs. J. H. Lee, A. N. Lindsay, W. A. Uren, Robert T. Malone, Jr., John F. Hoodenpyle, Louie E. Henry, B. D. Sutherland, Paul D. Cooper, Saul Hyman, Robert R. Cooper, Milburn Hassler and Raymond L. Robbins, all duly qualified, elected and sworn, who fix the punishment for the defendant at a term of not more than 10 years in the penitentiary.

It is therefore the judgment of the Court that the defendant be confined in the penitentiary for a term of not less than 10 years nor more than 10 years and pay all costs. Execution will issue against the defendant for the costs.

\* \* \* \*

103810

STATE v. SAMUEL ED ROBINSON—Felonious Assault

Came the Attorney General and the defendant in person, and this case came on for trial on the defendant's plea of guilty to the offense of Assault With Intent to Commit Murder in the First Degree before the Court and

the following jury, towit: Mrs. J. H. Lee, A. N. Lindsay, W. A. Uren, Robert T. Malone, Jr., John F. Hoodenplye, Louie E. Henry, B. D. Sutherland, Paul D. Cooper, Saul Hyman, Robert R. Cooper, Milburn Hassler and Raymond L. Robbins, all duly qualified, elected and sworn, who fix the punishment for the defendant at a term of not more than 5 years in the penitentiary.

It is therefore the judgment of the Court that the defendant be confined in the penitentiary for a term of not less than 3 years nor more than 5 years, and pay all costs. Execution will issue against the defendant for the costs.

It is further ordered that the sentence in this case run consecutively to the sentence in Case Number 103812.

\* \* \* \* \*

103811

#### STATE v. SAMUEL ED ROBINSON—Felonious Assault

Came the Attorney General and the defendant in person, and this case came on for trial on the defendant's plea of guilty to the offense of Assault With Intent to Commit Murder in the First Degree before the Court and the following jury, to-wit: Mrs. J. H. Lee, A. N. Lindsay, W. A. Uren, Robert T. Malone, Jr., John F. Hoodenplye, Louie E. Henry, B. D. Sutherland, Paul D. Cooper, Saul Hyman, Robert R. Cooper, Milburn Hassler and Raymond L. Robbins, all duly qualified, elected and sworn, who fix the punishment for the defendant at a term of not more than 10 years in the penitentiary.

It is therefore the judgment of the Court that the defendant be confined in the penitentiary for a term of not less than 3 years nor more than 10 years and pay all costs. Execution will issue against the defendant for the costs.

It is further ordered that the sentence in this case run consecutively to the sentence in Case Number 103810. Thereupon Court adjourned until tomorrow morning at 9:15 A. M.

/s/ Tillman Grant  
TILLMAN GRANT  
Judge

[Clerk's Certificate (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE,  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

W. S. NEIL, Warden, Tennessee State Penitentiary

ORDER—Filed June 9, 1970

This is a proceeding upon a petition for a writ of habeas corpus. The respondent has now filed an answer. The sole question raised by the record as it is presently constituted is whether the holding of *Waller v. Florida*, 38 L. W. 4263 (April 6, 1970) should be applied retroactively. The Court is of the opinion that this matter may properly be decided upon briefs without the need for an evidentiary hearing. The defendant has filed a brief in support of his position. The petitioner will be allowed 20 days to submit his brief on the legal issue here presented. Upon receipt of the petitioner's brief or upon the expiration of time for the filing thereof, the Court will proceed to a decision of the issue presented.

It is SO ORDERED.

APPROVED FOR ENTRY.

FRANK W. WILSON  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE,  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary

MEMORANDUM—September 22, 1970

This is a proceeding upon a petition for a writ of habeas corpus wherein the petitioner seeks to set aside his convictions and sentences in three cases, each entitled *State of Tennessee v. Samuel Ed Robinson*, being Docket Nos. 103,810, 103,811, and 103,812 in the Criminal Court for Hamilton County, Tennessee.

It appears undisputed in this case that the petitioner was tried and convicted of three offenses of assault and battery in violation of an ordinance of the City of Chattanooga, and was fined \$50.00 and assessed costs upon each offense. Thereafter, on September 26, 1962, a grand jury of Hamilton County returned three indictments in the above three cases, each charging petitioner with an offense of assault with intent to commit first degree murder. The occurrences giving rise to the three indictments were the same as those giving rise to the three city charges. Upon petitioner's plea of guilty to the indictments, he received two sentences of three to ten years and one sentence of three to five years, such sentences to run consecutively. Upon July 12, 1966, petitioner filed a petition for a writ of habeas corpus in the Criminal Court for Davidson County, Tennessee, upon grounds of double jeopardy. The writ was denied. Petitioner appealed to the Tennessee Supreme Court, which affirmed the judgment below. Upon March 28, 1967, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee upon grounds of double jeopardy. This



action was subsequently transferred to this court. By order dated May 15, 1967, this Court denied the writ. See *Samuel Ed Robinson v. C. Murray Henderson*, 268 F. Supp. 349 (E. D. Tenn., 1967). Petitioner appealed to the Sixth Circuit Court of Appeals, which affirmed this Court's denial of the writ by order dated April 10, 1968.

The instant petition again raises the double jeopardy argument. As in the prior petition filed in 1967, the petitioner's sole contention in the instant case is that he was twice placed in jeopardy for the same offense and that the convictions and sentences resulting from the second trial are therefore invalid. The petitioner relies upon the recently decided Supreme Court case of *Waller v. Florida*, 25 L. Ed., 435 (April 6, 1970). The facts, as stated above, being undisputed, the issue before the Court is one of law.

The facts in *Waller v. Florida* were as follows. Joseph Waller, together with a number of other persons, removed a canvas mural from the wall inside of the City Hall in St. Petersburg, Florida. As a result of this act, Mr. Waller was found guilty in municipal court of destruction of city property and disorderly breach of the peace and was sentenced to 180 days in the county jail. Subsequently, an information was filed against Mr. Waller charging him with grand larceny. Mr. Waller was found guilty of the charge, was sentenced to six months to five years, less 170 days of the 180-day sentence imposed by the municipal court. It was undisputed that the same facts gave rise to the city and state charges placed against Mr. Waller. In discussing the applicability of the Fifth Amendment's prohibition against double jeopardy as applied to the States in *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), the Court specifically held as follows:

"We decide only that the Florida courts were in error to the extent of holding that—

'... even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar

to the prosecution of such person in the proper state court.'"

The Court concluded that the defendant's second trial based on the same facts giving rise to the municipal court trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution.

The relevant factual situation in the instant case and in *Waller* are substantially identical. The only legal problem presented is whether the holding in *Waller* should be applied retroactively. The petitioner contends that it should. On the other hand, the respondent submits that the holding in *Waller* should be applied prospectively only. In support of his legal position the petitioner relies upon certain footnotes in *Waller v. Florida*, *supra*, and in *Ashe v. Swenson*, — U.S. —, — L. Ed. 2d — (1970). The respondent on the other hand relies upon the criteria outlined in *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199, and *Desist v. United States*, — U.S. —, — S. Ct. —, 22 L. Ed. 2d 248 (1969).

Before reviewing these criteria relied upon by the respondent, attention will be focused first upon the recent Supreme Court cases dealing specifically with the double jeopardy issue. The relevant portion of the Fifth Amendment to the United States Constitution provides: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ." In *Benton v. Maryland*, — U.S. —, — S. Ct. —, 23 L. Ed. 2d 707 (1969), the Supreme Court stated:

"... [W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled."

The defendant in *Benton* was tried in a state court for burglary and larceny. The defendant was convicted upon the burglary count but was found not guilty upon the larceny count. On appeal his conviction for burglary was set aside and the case was remanded for reindictment

and retrial. The defendant was reindicted upon both the larceny and the burglary charge and upon retrial was convicted of both charges. The conviction was affirmed on appeal by the state court, but reversed by the United States Supreme Court. Justice Marshall, speaking for the Court, stated: "It is clear that petitioner's larceny conviction cannot stand once federal double jeopardy standards are applied."

*North Carolina v. Pearce*, — U.S. —, — S. Ct. —, 23 L. Ed. 2d 656 (1969), decided the same day as *Benton v. Maryland*, *supra*, again dealt with the mandates of the Double Jeopardy Clause. As a prelude to its decision, the Court made the following comments relative to the scope of the Double Jeopardy Clause:

"The Court has held today, in *Benton v. Maryland*, — U.S. —, 23 L. Ed. 2d 707, 89 S. Ct. —, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

With this analysis of the guarantee against double jeopardy, the Court went further and held that:

"The constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense."

Further, the Court concluded that neither the Double Jeopardy Clause nor the Equal Protection Clause absolutely proscribes a more severe sentence upon reconviction.

Upon April 6, 1970, the Supreme Court decided *Waller v. Florida*, *supra*, upon which the petitioner in the instant case relies. The decision of the Court has hereto-

fore been outlined and will not be repeated. However, in arriving at the decision in *Waller* the majority and concurring opinions offer certain language that is relevant to the question presented by the instant case. Initially, Justice Burger notes the holding in *Benton v. Maryland* and states further:

"Here, as in *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969), *Benton* should be applied to test petitioner's conviction, although we need not and do not decide whether each of the several aspects of the constitutional guarantee against double jeopardy requires such application in similar procedural circumstances."

As a footnote to the aforementioned comment, Justice Burger provides the following admonition:

"*Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) controls any case which arises in its ambit. See *Ashe v. Swenson*, — U.S. — at — n. 1, 25 L. Ed. 2d at 469, 90 S. Ct. —. Nonetheless, when this Court granted certiorari in *Price v. Georgia*, No. 269, 1969 term, it requested that counsel "brief and argue [the] question of retroactivity of *Benton v. Maryland* [395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056], and whether that decision is applicable to this case." 395 U.S. 975, 23 L. Ed. 2d 764, 89 S. Ct. 2138 (1969). By our decisions in the instant case and in *Ashe v. Swenson*, *supra*, we do not resolve with respect to the circumstances presented in *Price v. Georgia*, *supra*, either of the two questions posed by the Court in that case." (Emphasis added)

Justice Brennan, however, in his concurring opinion expresses his views on *Benton* in the following terms:

"I adhere to the Court's holding in *Ashe v. Swenson*, — U.S. at — n. 1, 25 L. Ed. 2d at 469, 90 S. Ct. —, that our decision in *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969), holding the Double Jeopardy Clause of the Fifth Amendment applicable to the States, is 'fully "retro-

active'". See also *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969)."

In *Ashe v. Swenson*, — U.S. —, — S. Ct. —, 25 L. Ed 2d 469 (1970) decided the same day as *Waller v. Florida*, *supra*, the Supreme Court held that in view of *Benton v. Maryland*, *supra*, the federal rule of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. Mr. Justice Stewart wrote the majority opinion and expressed the opinion of seven members of the Court. In footnote 1 Justice Stewart made the following observation:

"There can be no doubt of the 'retroactivity' of the Court's decision in *Benton v. Maryland*. In *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072, decided the same day as *Benton*, the Court unanimously accorded fully 'retroactive' effect to the *Benton* doctrine."

The final case decided last term by the Supreme Court in the double jeopardy area was *Price v. Georgia*, — U.S. —, — S. Ct. —, 26 L. Ed. 2d 300 (1970). In the *Price* case, the defendant was tried upon a charge of murder and the jury returned a verdict of guilty as to the lesser included offense of voluntary manslaughter. The conviction was reversed on appeal and the defendant was retried over his objection upon the original charge of murder. The Supreme Court in setting aside the second conviction held that while the accused could have been retried upon the lesser included offense of voluntary manslaughter, the double jeopardy prohibition of the Fifth Amendment prohibited his being twice put in jeopardy on the murder charge even though on the second trial he was convicted only of the same lesser offense as in the first trial.

Once again in footnote 9 Chief Justice Burger makes the following observation:

"The last of the decisions of the Georgia court affirming the petitioner's conviction was rendered on September 24, 1968, well before *Benton* was decided. But *Benton* has fully retroactive application. See *Waller v. Florida*, 397 U.S. 387, 391 n. 2 (1970), . . ."

Although there has never been a reasoned analysis by the Supreme Court on the issue of retroactivity, this Court can only conclude from the above review of the cases that *Benton v. Maryland* and *Waller v. Florida* should each be accorded fully retroactive application. See also in this connection *Mullreed v. Kropp*, (C.A. 6 1970) 425 F. 2d 1095.

Were this Court to make its determination of retroactivity on the basis of the criteria laid down by the United States Supreme Court in the cases of *Linkletter v. Walker*, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965); *Stovall v. Denno*, 388 U.S. 293, 18 L. Ed 2d 1199, 87 S. Ct. 1967 (1967); and *Desist v. United States*, 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969), a different result might well be required. Considering the extent of reliance by law enforcement authorities upon the rule as it existed prior to *Waller v. Florida*, considering the effect on the administration of justice occasioned by the new rule laid down in that case, and noting particularly the large number of jurisdictions that have treated municipalities and the state as separate sovereigns for double jeopardy purposes (see footnote 3 in *Waller v. Florida*), this Court is of the opinion that a careful and reasoned inquiry should be made as to whether the administration of justice might not be seriously disrupted by retroactive application of the rule in *Waller v. Florida*. It appears however, for the reasons stated above, that that inquiry is now precluded, at least to a lower federal court.

A judgment will accordingly enter setting aside the petitioner's convictions and sentences in Criminal Docket Nos. 103,810, 103,811, and 103,812 in the Criminal Court for Hamilton County, Tennessee. The petitioner will be forthwith released from any further custody by reason of the said convictions and sentences.

The entry of a judgment in accordance with this memorandum will be stayed for a period of seven days to permit the parties to make representations unto the Court regarding the form of the order to be entered, including any provisions regarding the release of the petitioner, regarding an appeal, regarding any further stay pending appeal, and regarding bail pending appeal.

Reference in this regard is made to Rule 23(c), *Federal Rules of Appellate Procedure*. An oral hearing will be held upon these matters at 4:00 p.m. on September 29, 1970, at which the petitioner need not be present in person but will be represented by counsel.

FRANK W. WILSON  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE,  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary

ORDER—September 29, 1970

A conference was held upon this 29th day of September, 1970, pursuant to the memorandum of the Court heretofore entered on September 22, 1970, as regards the form and conditions of the judgment to enter on the said memorandum. Present at the conference were James D. Robinson, counsel for the petitioner, and General Edward E. Davis, District Attorney General, counsel for the respondent. Upon representation of counsel for the respondent that he proposed to immediately file a petition to reconsider and upon request that the entry of a judgment be further stayed herein, the Court, after receiving argument of counsel, concluded that a further stay of ten days should be granted to receive and consider any motion to reconsider. A further hearing will be set herein upon October 7, 1970, at 4:00 p.m. at which the Court will receive oral argument in support of the motion to reconsider.

It is SO ORDERED.

APPROVED FOR ENTRY.

FRANK W. WILSON  
United States District Judge



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE,  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary

ORDER—Filed October 27, 1970

This action is presently before the Court upon the respondent's motion to reconsider. The respondent seeks by this motion to have this Court reconsider its memorandum of September 22, 1970, wherein the Court held that the case of *Waller v. Florida*, — U.S. —, — S. Ct. —, 25 L. Ed. 2d 435 (April 6, 1970) should be accorded fully retroactive application.

Having considered the brief of the respondent and argument of counsel and having re-examined the relevant cases upon this matter, the Court is of the opinion that its memorandum of September 22, 1970, was in error to the extent of holding that:

"Although there has never been a reasoned analysis by the Supreme Court on the issue of retroactivity, this Court can only conclude from the above review of the cases that *Benton v. Maryland* and *Waller v. Florida* should each be accorded fully retroactive application."

Upon re-examination of *North Carolina v. Pearce*, 23 L. Ed. 2d 656 (1969); *Benton v. Maryland*, 23 L. Ed. 2d 707 (1969); *Waller v. Florida*, 25 L. Ed. 2d 435 (1970); *Ashe v. Swenson*, 25 L. Ed. 2d 469 (1970); and *Price v. Georgia*, 26 L. Ed. 2d 300 (1970), it is quite clear that the holding in *Benton v. Maryland*, namely that the double jeopardy prohibition of the Fifth Amendment applies to the states through the Fourteenth Amendment, is to be accorded fully retroactive application.



However, close re-examination of these cases also discloses that the pronouncement of the Supreme Court regarding retroactivity in each instance refers only to the holding in the case of *Benton v. Maryland*, *supra*, and that the Supreme Court has neither directly nor by implication accorded *Waller v. Florida*, *supra*, retroactive application insofar as the *Waller* case holds that the "dual sovereignty" theory is an anachronism and should be abrogated with regard to city and state prosecutions. Accordingly, this Court is of the opinion that the retroactivity of *Waller v. Florida* has not been resolved by the Supreme Court and must therefore be determined on the basis of the criteria established by the Supreme Court in the cases of *Linkletter v. Walker*, 381 U.S. 618 (1965); *Stovall v. Denno*, 388 U.S. 293 (1967); and *Desist v. United States*, 394 U.S. 244 (1969).

In this regard, the Court is further of the opinion that an evidentiary hearing should be held upon November 3, 1970, at 3:00' p.m. in order to afford both parties an opportunity to present evidence and argument upon (1) the purpose to be served by the abrogation of the dual sovereignty theory with regard to city and state prosecutions; (2) the extent of the reliance by law enforcement authorities upon the dual sovereignty theory; and (3) the effect on the administration of justice of a retroactive application of the *Waller* case insofar as it abrogates the dual sovereignty theory as it was applied to city and state prosecutions.

It is SO ORDERED.

APPROVED FOR ENTRY.

FRANK W. WILSON  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE,  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary

ORDER—November 18, 1970

This case came on for further hearing upon this 17th day of November 1970, whereupon counsel for the respondent moved the Court to be allowed additional time to accumulate and present evidence with respect to the impact of a retroactive application of the rule laid down in *Waller v. Florida*, — U.S. —, 25 L. Ed. 2d 435. Having heard argument of counsel thereon and considered the objections of counsel for the plaintiff, the Court is of the opinion that the further hearing in this case should be continued until 4:30 p.m. upon November 30, 1970.

It is SO ORDERED.

APPROVED FOR ENTRY.

FRANK W. WILSON  
United States District Judge

## EXHIBIT 1

## AFFIDAVIT

CLYDE M. SANDERS, having been first duly sworn deposes and says:

That he is the duly elected, qualified and acting Clerk of the Criminal Courts for Hamilton County, Tennessee.

That he has been associated with this office for more than twenty-five years and has held his present position for ten years.

That a part of his work as such Clerk is the handling of all cases sent to the State Criminal Courts from the municipal courts of the City of Chattanooga, Tennessee.

I would estimate that until recently fully ninety-five (95%) percent of the State cases coming to the State Courts have had accompanying charges of violations of City of Chattanooga municipal ordinances arising out of the same acts upon which the State charges were founded.

That for the most part the municipal ordinances involved in these cases were either duplication of State statutes, or lesser offenses included in the State laws.

Further this deponent saith not.

This 30th day of November, 1970.

/s/ Clyde M. Sanders  
CLYDE M. SANDERS

Sworn to before me this  
November 30th, 1970.

/s/ Virginia J. Johnson  
VIRGINIA J. JOHNSON  
NOTARY PUBLIC  
My Commission Expires:  
October 8, 1972

## EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE,  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

W. S. NEIL, Warden, Tennessee State Penitentiary

## AFFIDAVIT OF PHIL M. CANALE, JR.

I, Phil M. Canale, Jr., do hereby certify that I am the District Attorney General for the 15th Judicial Circuit of the State of Tennessee (Shelby County) and have been so since March 15, 1955.

Upon an examination by my office of the possible effects of holding United States Supreme Court case of *Waller vs. Florida*, 38 L. W. 4263, April 6, 1970, retroactive, I make the following observations to this Honorable Court. The Criminal Court Clerk's Office of Shelby County, Tennessee reports that an average of 5,000 True Bills are returned by the Grand Jury of Shelby County in each calendar year. The present misdemeanors pending in Shelby County, Tennessee as of this date is 2,015. Based upon a survey made by sampling our our cases, which we feel to be an accurate representation of all our cases, we have found that there would be a minimal effect on felonies which were pending both prior to *Waller vs. Florida*, and presently pending if *Waller vs. Florida* were declared to be retroactive. This minimal effect is due to the established way in which the bind-over hearings were held in the City Court in this jurisdiction; other counties could be adversely affected to a much greater degree. However, with respect to misdemeanors that are presently pending, we feel that approximately 15% of the present misdemeanors in Shelby County would have to be dismissed if *Waller vs. Florida* was declared

to be retroactive and if there was no distinction made between the very limited jurisdiction of the municipal courts of Tennessee as compared to the municipal courts of Florida.

/s/ Phil M. Canale, Jr.  
PHIL M. CANALE, JR.

COUNTY OF SHELBY  
STATE OF TENNESSEE

Came on before me this 30 day of October, 1970, Phil M. Canale, Jr., whom I personally know to be Phil M. Canale, Jr. and stated to me that the above information is true according to his best knowledge, information and belief.

/s/ Brian Jaff  
BRIAN JAFF  
Notary Public

My Commission Expires:  
Jan. 10, 1972

**PHIL M. CANALE, JR.**  
**District Attorney General**  
**Fifteenth Judicial Circuit of Tennessee**  
**County of Shelby**

**Lloyd A. Rhodes**  
**Executive Assistant**

**William D. Haynes**  
**Administrative Assistant**

**John L. Carlisle**  
**E. L. Hutchinson, Jr.**  
**Clyde R. Venson**  
**Criminal Investigators**

**Non Support Division**  
**Earl E. Fitzpatrick**  
**Assistant Attorney General**  
**H. J. Beach**  
**Investigator**  
**Phone 534-9250**

**Assistants**

**Ewell C. Richardson**  
**Jewett H. Miller**  
**J. Clyde Mason**  
**Sam J. Catanzaro**  
**Leonard T. Lafferty**  
**Arthur T. Bennett**  
**Don D. Strother**  
**Don A. Dino**  
**Joseph L. Patterson**  
**Eugene C. Gaerig**  
**Harvey Herrin**  
**John W. Pierotti**  
**James G. Hall**  
**James H. Allen**  
**Thomas F. Graves**  
**Thomas A. Stroud**  
**T. E. Crawford**  
**Billy F. Gray**  
**Raymond S. Clift**  
**Don F. Young**  
**Leland M. McNabb**

**Shelby County Office Building**  
**157 Poplar Avenue**  
**Memphis, Tenn. 38103**

**Phone 901-534-9251**

**November 17, 1970**

**Honorable Edward Davis**  
**District Attorney General**  
**Courthouse**  
**Chattanooga, Tennessee**

**Dear General Davis:**

In response to your request to check the list of the 840 names which you sent me, who are presently inmates in the State Penitentiary from Shelby County to deter-

mine what percentage would be affected by a retroactive ruling of the *Waller* decision, this is to advise that time did not permit the checking of the entire list. We selected at random 42 files from your list which is 5% of the total, and feel that this figure is representative of the total and reflects an accurate picture of the situation in Shelby County.

Of the 42 files we checked, we found two (2) cases which could be adversely affected by a retroactive ruling, which indicates to me that we have approximately 40 serious felony cases involving people in the penitentiary which would probably be subject to release if *Waller* is held retroactive.

As I mentioned to you on the phone, we have been fortunate in this jurisdiction in the manner in which these cases have been handled in City Court as far as the lack of placing city charges on these serious felony cases. I feel you will probably find in other jurisdictions in this state and other states, the percentage of cases adversely affected by such a ruling would be much greater.

Sincerely yours,

/s/ Phil M. Canale, Jr.  
PHIL M. CANALE, JR.  
District Attorney General

PMCjr/bk

## EXHIBIT 3

## AFFIDAVIT

I, Edward E. Davis, being first duly sworn do depose and say:

That I am the duly qualified, elected and acting District Attorney General for the Sixth Judicial Circuit for the State of Tennessee.

That at my request a survey of the Attorneys General of the several states was made by the Honorable David M. Pack, Attorney General for the State of Tennessee of the possible impact on the administration of justice in each of the jurisdictions if the holding of the United States Supreme Court in the case of *Waller v. Florida*, 90 S. Ct. 1184 were to be given retroactive application.

That as of the date hereof responses from such survey number twenty-seven. These responses are attached hereto and filed herewith as exhibits #1-27 to this affidavit.

That there are approximately 267 inmates presently in the Tennessee penitentiaries who were convicted in Hamilton County, Tennessee.

That it is estimated that one-half of this number, or 133, were charged in situations arising in the geographical limits of the City of Chattanooga, Tennessee and consequently were taken first through the municipal court of the City of Chattanooga.

Based upon the affidavit of the Criminal Court Clerk of Hamilton County, Tennessee that ninety-five (95%) of the defendants coming from that municipal court have in the past been charged with both State and City offenses, either the same or as lesser included offenses, that there are now some 126 persons presently in the penitentiary who could possibly be subject to release if *Waller v. Florida* be given retroactive application.

That time has not permitted any examination of either the defendants sentenced to the Hamilton County workhouse or jail on less serious felonies or misdemeanor cases where the same dual prosecution situation has existed.



Further this deonant saith not.

/s/ Edward E. Davis  
EDWARD E. DAVIS  
District Attorney General

Sworn to and subscribed before me  
this 30th day of November, 1970.

/s/ Virginia J. Johnson  
VIRGINIA J. JOHNSON

NOTARY PUBLIC

October 8, 1972

MY COMMISSION EXPIRES

## EXHIBIT 1

STATE OF ALABAMA  
Office of Attorney General  
Montgomery, Alabama 36104

November 12, 1970

[STATE SEAL]

MacDonald Gallion  
Attorney General  
R. Hunter Phillips  
Executive Assistant

The Honorable David M. Pack  
Attorney General of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

John G. Bookout  
Deputy Attorney General

Assistant Attorneys  
General

Charles H. Barnes  
Richard F. Calhoun  
David W. Clark  
Paul T. Gish, Jr.  
Leslie Hall  
Lloyd G. Hart  
Herbert H. Henry, III  
Randolph G. Lurie  
William N. McQueen  
Gordon Madison  
Joseph G. L. Marston, III  
Robert E. Morrow  
Tabor R. Novak, Jr.  
William G. O'Rear  
Jamie L. Pettigrew  
Joseph V. Price, Jr.  
Jasper B. Roberts  
Bernard F. Sykes  
Walter S. Turner  
John C. Tyson, III

Dear General Pack:

In regard to your inquiry concerning the impact of retroactive application of the *Waller* case in Alabama, I have contacted our prison officials to determine the number of prisoners who might be held under similar facts. I have been told by them that it would be practically impossible to make this determination and that even if it could be made that there would be less than a dozen people who would fall within the *Waller* facts.

Their thoughts on the number of possible individuals involved are probably correct since even though technically possible double prosecutions of the type in *Waller* are strongly discouraged.

I am sorry that I have not been able to give you any positive information to use in your upcoming case.

Sincerely,

MACDONALD GALLION  
Attorney General

By:

/s/ Joseph Victor Price, Jr.  
JOSEPH VICTOR PRICE, JR.  
Assistant Attorney General

JVP:as

## EXHIBIT 2

[STATE SEAL]

Telephone  
793-3500WILLIAM J. SCOTT  
Attorney General  
State of Illinois  
160 North La Salle St.  
Chicago 60601

November 19, 1970

The Honorable David M. Pack  
Attorney General of the State of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

I have your letter of October 29, 1970, requesting my analysis of the effect of a decision making *Waller v. Florida*, 397 U.S. 387 (1970) retroactive. In my opinion, such a holding would have little practical effect in Illinois.

As the Supreme Court recognized in *Waller*, Illinois is one of the states which treats a single act as a possible violation of both a state penal statute and a municipal ordinance. Prior to *Waller*, each of these violations could be separately tried and punished without violating the concept of double jeopardy. See *City of Evanston v. Wazau*, 364 Ill. 198, 4 N.E. 2d 78 (1936); *City of Chicago v. Clark*, 359 Ill. 374, 194 N.E. 537 (1935); *City of Chicago v. Berg*, 48 Ill. App. 2d 251, 199 N.E. 2d 49 (1964); *People v. Behymer*, 48 Ill. App. 2d 218, 198 N.E. 2d 729 (1964).

The Illinois compulsory joinder statute [Ill. Rev. Stat., (1969), Ch 38 § 3-3. Multiple Prosecutions for Same Act] requires that several offenses established by the same conduct of a defendant, if known to the proper prosecuting officer at the time of commencing prosecution and within the jurisdiction of a single court, must

be prosecuted in a single prosecution. However, the term "offense" is defined as a violation of a state penal statute. Therefore, the compulsory joinder provision applies only to prosecution for violations under state law and has no application to the situation treated in *Waller*. Yet, the statute does indicate the prevailing philosophy in Illinois that several criminal charges arising from the same conduct should be tried in a single prosecution.

In practice, a defendant usually would be prosecuted on the state charge if the act involved constitutes a more serious offense or is an element of a more serious offense than the municipal violation. Rarely would this prosecution be followed by a trial of the ordinance violation. Therefore, while the decision in *Waller* has effected a change in the Illinois law of multiple prosecutions, it has not altered the practice generally followed prior to that decision. Therefore, holding *Waller* retroactive would have minimal effect other than to formalize the prior Illinois practice.

Very truly yours,

WILLIAM J. SCOTT  
Attorney General  
State of Illinois

By /s/ James B. Zagel  
JAMES B. ZAGEL  
Assistant Attorney General

JBZ:pad

EXHIBIT 3

[STATE SEAL]

THE STATE OF COLARADO

Department of Law

Office of the Attorney General

Duke W. Dunbar  
Attorney General

104 State Capitol  
Denver, Colorado 80203

John P. Moore  
Deputy  
Attorney General

November 4, 1970

Honorable David M. Pack  
Attorney General  
State of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

This office does not maintain sufficient records to advise you to what effect the holding of *Waller v. Florida* would have upon the administration of justice in the State of Colorado.

Prosecutions are handled by local district attorneys who do not come under our jurisdiction. Therefore, we are not privy to any information pertinent to the prior criminal records of persons convicted by the district attorney.

Very truly yours,

/s/ John P. Moore  
JOHN P. MOORE  
Deputy Attorney General

JPM:HT

## EXHIBIT 4

[STATE SEAL]

THE DEPARTMENT OF LAW  
State of Georgia  
Atlanta  
30334

Arthur K. Bolton  
Attorney General

132 State Judicial Building  
Telephone: 525-0401

November 4, 1970

Honorable David M. Pack  
Attorney General  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

This is in reply to your letter inquiring about the impact in Georgia if *Waller v. Florida*, 397 U.S. 387 (1970) should be applied retroactively.

Georgia adheres to a preemption doctrine which denies local governments the authority to prohibit by ordinance that conduct which has been declared criminal by the State Penal Code. Therefore, the *Waller* decision precluding both municipal and State trials for an identical offense should have a minimal impact upon the administration of the criminal laws of this State.

Very truly yours,

/s/ Arthur K. Bolton  
ARTHUR K. BOLTON  
Attorney General

AKB:jg

## EXHIBIT 5

[STATE SEAL]

Address Reply to  
"The Attorney General of Hawaii"  
and Refer to  
Initials and Number  
WHY:bys

Cable Address:  
AttGen

Bertram T. Kanbara  
Attorney General

STATE OF HAWAII  
Department of the Attorney General

Hawaii State Capitol  
4th Floor  
Honolulu, Hawaii 96813

November 6, 1970

David M. Pack, Esq.  
Attorney General  
State of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Re: Waller v. Florida, 397 U.S. 387

Dear General Pack:

This is in response to your letter of October 29, 1970 inquiring as to the impact that giving the rule enunciated in Waller v. Florida retroactive effect would have on the administration of justice in our State.

The answer appears to be "none".

In our State, the county legal offices handle all prosecutions of both state statutes and county ordinances. The Office of the Prosecuting Attorney of the City and County of Honolulu (the County which has the bulk of our population) could not recall any instance of separate prosecutions of the same person for a violation of an ordinance and for a violation of a statute growing out of the same acts.

Yours truly,

/s/ William H. Yim  
WILLIAM H. YIM  
Deputy Attorney General  
State of Hawaii



## EXHIBIT 6

[STATE SEAL]

STATE OF IDAHO  
Office of the Attorney GeneralRobert M. Robson  
Attorney GeneralBoise 83707  
November 3, 1970The Honorable David M. Pack  
Attorney General  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

I have received your letter of October 29, 1970, by which you have asked me to anticipate the effect of a possible retroactive application of *Waller v. Florida*.

In the first instance, I would suggest that to retroactively apply the *Waller* case would be to unduly burden the administration of our criminal process. This is especially so in a state housing a great number of felonious offenders who are first convicted of violating a local city ordinance.

Unfortunately, the State of Idaho has not now, nor during the past decade, confined an offender under the circumstances posed by the *Waller* case. While, therefore, a retroactive application of *Waller v. Florida* will not directly affect the Idaho criminal process, I am fully aware and sympathetic toward those states which will be inundated with writs of habeas corpus. In my opinion, to crowd the already overcrowded court dockets by applying *Waller* retroactively, we will simply witness an undesirable form of jurisprudential suicide.

I wish to thank you and if I may be of further service in any way, please feel free to contact me.

Very truly yours,

/s/ Robert M. Robson  
ROBERT M. ROBSON  
Attorney General

RMR:sam

## EXHIBIT 7

[STATE SEAL]

Theodore L. Sendak  
Attorney General

STATE OF INDIANA  
Attorney General  
Indianapolis  
46204

November 4, 1970

The Honorable David M. Pack  
Attorney General  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

In response to your request concerning the applicability of *Waller v. Florida*, I am unable to give you a definite answer. Apparently, the precise issue that was raised in *Waller* has never been decided in this State.

I spoke with the head of adult corrections in the Indiana Department of Corrections, and he stated that he was unaware of any inmate who might be affected by the *Waller* decision.

It is our feeling that if any Indiana inmate had been committed under circumstances to which *Waller* would be applicable, a Writ of Habeas Corpus would have been filed by this time. We have no such writs in our office.

If I may be of service in any other way, please advise.

Sincerely,

THEODORE L. SENDAK  
Attorney General of Indiana

WILLIAM F. THOMPSON  
Assistant Attorney General

/s/ Fred R. Spencer  
FRED R. SPENCER  
Law Clerk

FRS/jf

## EXHIBIT 8

[STATE SEAL]

James S. Erwin  
Attorney General

George G. West  
John W. Benoit, Jr.  
Jon R. Doyle  
Deputy Attorneys General

STATE OF MAINE  
Department of the Attorney General  
Augusta, Maine 04330

November 5, 1970

The Honorable David M. Pack  
Attorney General of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

This will acknowledge receipt of your letter of October 29 concerning the retroactive effect of *Waller v. Florida*. This office does not do all the criminal prosecution in the State. The bulk of the criminal prosecution is handled by the County Attorney in each of our 16 counties. However, I have never heard of any problem that has been created by the *Waller* case. I doubt very much if any prosecutor in the State has ever tried to prosecute a case in the manner which was done in Florida.

Very truly yours,

/s/ George C. West  
GEORGE C. WEST  
Deputy Attorney General

GCW:H

EXHIBIT 9

[STATE SEAL]

Leon S. Cohan  
Deputy Attorney General

STATE OF MICHIGAN  
Department of Attorney General

FRANK J. KELLEY  
Attorney General  
Lansing  
48918

November 10, 1970

The Honorable David M. Pack  
Attorney General  
Supreme Court Building  
Nashville, Tennessee 37218

Dear General Pack:

In response to your letter of October 29, 1970, regarding the impact of *Waller v. Florida*, 397 U.S. 387, if the decision is held to be retroactive, I regret that I cannot be helpful.

The information you seek would have to be found by an examination of the files of more than 8,000 inmates of our prison system and I know you will realize the impracticability of doing this.

With best personal regard.

Yours very truly,

/s/ Frank J. Kelley  
FRANK J. KELLEY  
Attorney General

## EXHIBIT 11

[STATE SEAL]

A. F. Summer  
Attorney General

Department of Justice  
Office of the Attorney General  
Jackson, Mississippi 39205

November 3, 1970

Honorable David M. Pack, Attorney General  
State of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

In your letter of October 29, 1970, you state that you are compiling a memorandum to the United States District Court for the Eastern District of Tennessee in support of your position that to apply *Waller v. Florida*, 397 U.S. 387 (1970) would have a disruptive effect throughout the United States upon the administration of criminal justice.

I am sure you noted in footnote 3 to the Court's opinion in *Waller*, the case of *May vs. Town of Carthage*, 191 Miss. 97 So. 2d 801 (1941) was cited. The holding of the Mississippi Supreme Court in that case was, as pointed out in Chief Justice Burger's opinion in *Waller*, to the effect that municipalities and the state are separate sovereign entities each capable of imposing punishment for the same alleged crime. *Waller* now holds that this is not so and that municipalities, being creatures of the state, are regarded as governmental instrumentalities created by the state and are not to be considered as separate sovereign entities such as the States and the United States.

I have discussed the possible effect of the retroactivity of *Waller* with members of my staff, who have been in the criminal [illegible]

*Waller* retroactive would probably have no effect whatsoever in Mississippi. It would be impossible to canvass every municipality and county to determine if anyone is presently serving a sentence where he was convicted both for an offense against a municipality and against the state, but it is safe to say that there are probably none. It has been very seldom that anyone in Mississippi has been prosecuted both for an offense against a municipality and also against the state arising out of the same factual situation.

You may be interested to know that, while *Waller* involves a violation of a city ordinance and a state statute, in Mississippi it is not necessary for the municipalities to adopt ordinances, since under Section 3374-78 Mississippi Code 1842 Recompiled all penal offenses under the laws of the state which are misdemeanors are made offenses against municipalities when committed within the corporate limits.

I am sorry that I cannot give you any comfort from this end of the line. When your memorandum has been completed I would appreciate a copy of it.

Sincerely,

/s/ A. F. Summer  
A. F. SUMMER  
Attorney General

AFS/dm

## EXHIBIT 12

[STATE SEAL]

John C. Danforth  
Attorney General

Offices of the  
ATTORNEY GENERAL OF MISSOURI  
Jefferson City

November 5, 1970

Honorable David M. Pack  
Attorney General  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

This will acknowledge receipt of your letter dated October 29, 1970, which has been referred to me for reply.

We have no available figures which would illustrate the disruptive effect of a retroactive application of *Waller v. Florida*. Frankly, I would imagine that those persons who are incarcerated for serious offenses, who prior to their state convictions were tried in a municipal court, could be counted on both hands. This is just a personal estimate and, frankly, we have no figures to back it up.

One effect of *Waller v. Florida* has been to generate some thinking, especially in the urban areas, about a common warrant office where all warrants for arrest on prosecutions pending in municipal or state courts would originate. Therefore, an easy check would be available on prosecutions violative of the *Waller* decision.

I am sure you are aware of the recent case of *State v. Fletcher*, 8 CrL 1018 (10-23-70), which appears to be a further extension of the *Waller* doctrine.

General Danforth sends his kindest regards and asked me to reply on his behalf as he is recuperating from the recent Senatorial race.

Respectfully,

/s/ Dale L. Rollings  
DALE L. ROLLINGS  
Chief Counsel  
Criminal Division

dl



## EXHIBIT 13

State of Nebraska

DEPARTMENT OF JUSTICE

Clarence A. H. Meyer  
Attorney GeneralLincoln  
68509

November 3, 1970

Hon. David M. Pack  
Attorney General of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

In reply to your October 29 letter requesting information on the possible effect of a retroactive application of Waller v. Florida, I am afraid that Nebraska cannot be of much help to you. I cannot recall a situation of this kind in the 20 years I have been here in the office. Further confirmation that we have not had a case of this kind arises from the fact that not a single penitentiary prisoner has initiated a habeas corpus action based on Waller, and they seem to get Supreme Court opinions, and to use them, before we get the opinions.

Very truly yours,

/s/ Clarence  
CLARENCE A. H. MEYER  
Attorney General

CAHM:dnj

EXHIBIT 14

[STATE SEAL]

STATE OF NEVADA  
Department of Attorney General  
Carson City

November 4, 1970

The Honorable David M. Pack  
Attorney General of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

re: Waller v. Florida, retroactive application

Dear General Pack:

In answer to your inquiry of October 29, 1970, concerning possible retroactive application of *Waller v. Florida* and its effect within Nevada, let me say that Nevada's position anticipated *Waller* in 1935 in *State v. Holm*. To the best of our knowledge, there would be no effect insofar as our State Supreme Court is concerned.

Sincerely,

HARVEY DICKERSON  
Attorney General

/s/ George H. Hawes  
GEORGE H. HAWES  
Deputy Attorney General

GHH/cw

## EXHIBIT 15

[STATE SEAL]

THE STATE OF NEW HAMPSHIRE  
Attorney General  
ConcordWarren B. Rudman  
Attorney GeneralWilliam F. Cann  
Deputy Attorney General

## Assistant Attorneys General

Robert W. Moran  
Irma A. Matthews  
Henry F. Spaloss  
Donald A. Ingram  
David H. Souter  
W. Michael Dunn  
Thomas B. Wingate

## Attorneys

John T. Pappas  
Richard A. Hampe  
Judith D. Mulligan  
Donald W. Stever, Jr.

November 12, 1970

Honorable David M. Pack  
Attorney General  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

Attorney General Warren Rudman has instructed me to answer your letter of October 29, 1970, with respect to the question of the retroactive application of *Waller v. Florida*.

We anticipate no difficulties whatever arising out of the *Waller* decision and it is of no consequence in our State whether the *Waller* decision should be held to be retroactive.

Sincerely yours,

/s/ Henry F. Spaloss  
HENRY F. SPALOSS  
Assistant Attorney General

HFS:bas

## EXHIBIT 16

[STATE SEAL]

STATE OF NEW MEXICO  
Office of the Attorney General  
Department of Justice

James A. Maloney  
Attorney General

Gary O'Dowd  
Deputy Attorney General  
Assistant Attorneys General  
Leila A. Andrews  
Frank N. Chavez  
James C. Compton, Jr.  
C. Emery Cuddy, Jr.  
John A. Darden, III  
Carl P. Dunifon  
Thomas L. Dunigan  
Ray H. Shollenbarger  
Richard J. Smith  
Mark B. Thompson, III  

---

Thomas P. Whelan, Jr.

P. O. Box 2246  
Santa Fe, N.M. 67501

November 4, 1970

The Honorable David M. Pack  
Attorney General  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

You have asked whether the recent Supreme Court case of *Waller v. Florida*, would have a significant impact upon the administration of justice in the State of New Mexico if this decision were made retroactive.

Although we are not able to tell you the number of persons who are now incarcerated in our state penitentiary for serious offenses, who prior to their state trial were tried in a municipal court for violation of a local ordi-

nance, we assume that there are very many. This assumption is based upon the fact that many of our municipalities have adopted as their criminal codes the State Criminal Code and therefore have identical criminal offenses as the State. We realize that a number of persons in the penitentiary have been tried both in municipal court and in our state court and that the retroactive application of the *Waller* decision would require that many of these individuals be released from the penitentiary without any possibility of them being retried.

We feel that anything that you may do to prevent the retroactive application of this decision will be very beneficial to the State of New Mexico.

Sincerely yours,

/s/ Ray Shollenbarger  
RAY SHOLLENBARGER  
Assistant Attorney General

RS/gr

## EXHIBIT 17

[STATE SEAL]

STATE OF NORTH CAROLINA  
Department of JusticeRobert Morgan  
Attorney GeneralP. O. Box 629  
Raleigh  
27602

3 November 1970

Honorable David M. Pack  
Attorney General of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

This is to acknowledge receipt of your letter of October 29, 1970, addressed to Attorney General Robert Morgan, inquiring as to the effect of *Waller v. Florida*, 397 U.S. 387 (1970), upon the administration of justice in the State of North Carolina.

In North Carolina all criminal offenses are violation of State law, and, therefore, a plea of former jeopardy has always been sustained if the State subsequently attempted to indict the individual for a felony if the misdemeanor for which he was tried in the inferior court was a lesser included offense. Our local ordinances in this State deal with strictly local matters unrelated to our criminal codes, i.e., zoning violations, business permits, etc., and we are unaware of any instances where a statutory scheme such as that found in the State of Florida and discussed by the Court in *Waller* can be found in the State of North Carolina.

Therefore, we do not know of any individuals incarcerated in the State of North Carolina who may be

affected by either a prospective or retroactive application of Waller inasmuch as we do not believe our substantive law contains the defect condemned in Waller.

Very truly yours,

ROBERT MORGAN  
Attorney General

/s/ Jacob L. Safron  
JACOB L. SAFRON  
Assistant Attorney General

JLS/p

## EXHIBIT 18

[STATE SEAL]

## STATE OF NORTH DAKOTA

Helgi Johanneson  
Attorney General

Bismark, North Dakota 58501

Paul M. Sand  
First AssistantTelephone  
224-2210John E. Adams  
Gerald W. Vandewalle  
Vance K. Hill  
Lynn E. Erickson  
Robert P. Brady  
AssistantsMaybelle Gulling  
Charlotte Logan  
Elsie J. Johnston  
Secretaries  
Susan Albers  
Clerk  
John R. Erickson  
Auditor

November 5, 1970

The Honorable David M. Pack  
Attorney General  
State of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Dear Mr. Pack:

This is in response to your inquiry as to what effect the retroactive application of Waller vs. Florida, 397 U.S. 387, 25 L Ed 2d 435 (1970) has on the State of North Dakota.

As of this date, we are not aware of any proceedings relying upon the above case for a reversal or dismissal of a conviction.

At the time the opinion came out from the United States Supreme Court, I mentioned to H. L. Holt, the director of the League of Municipalities, the possible



results of this case and that the cities should exercise a greater discretion in determining what type of cases should be prosecuted under the municipal ordinances, particularly if there was a possibility that the violation may have been against the state law, for which a much greater penalty can be imposed.

As of now I have not received any feedback of any kind indicating any problems with the Waller vs. Florida case.

Yours truly,

/s/ Paul M. Sand  
PAUL M. SAND  
First Assistant  
Attorney General

PMS:al

## EXHIBIT 19

[STATE SEAL]

G. T. Blankenship  
Attorney General

THE ATTORNEY GENERAL  
OF OKLAHOMA

Oklahoma City, Okla. 73105

November 4, 1970

Honorable David M. Pack  
Attorney General  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

In response to your letter of October 29, 1970, the members of this staff devoting their attention to criminal matters, have carefully considered your request for our observations on any effect in this State of retroactive application of *Waller v. Florida*, 397 U.S. 387 [1970].

At the present we have no matters pending on appeal which involve the problem presented by *Waller*, supra, and are unable to recall any possible cases that may confront us in the near future.

In consequence we thus are forced to say that we have no basis at this time in this State of forming and expressing an opinion on the possible disruptive affect of retroactive application of *Waller*, supra. However, retroactive application of innovative U.S. Supreme Court decisions on U. S. Constitutional questions in the criminal field is one that has confronted this office upon frequent occasions in the recent past. In each instance, retroactive application of an innovative U. S. Supreme Court decision has been resisted by this office as having a serious affect upon the administration of our criminal laws. We have consistently opposed any retroactive application when that problem has been presented.

We regret our inability to give you more specific information for your use in the U. S. District Court for the Eastern District of Tennessee. This stems from the fact that we have not as yet been confronted with this specific problem here in this State.

Sincerely,

FOR THE ATTORNEY GENERAL

/s/ H. L. McConnell  
H. L. McCONNELL  
Assistant Attorney General

HLM:rh

## EXHIBIT 20

[STATE SEAL]

Lee Johnson  
Attorney GeneralDiarmuid F. O'Scannlain  
Deputy Attorney GeneralDEPARTMENT OF JUSTICE  
State Office Building  
Salem, Oregon 97310  
Telephone: (503) 364-2171

November 9, 1970

Honorable David M. Pack,  
Attorney General of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219Re: Retroactivity of *Waller v. Florida*

Dear General Pack:

I have no solid data to provide to you, however I am able to give an impressionistic and fragmentary idea of the effect of *Waller v. Florida* in Oregon.

The impact of the case is diminished by the existence of ORS 169.160, which provides for discharge of indigents imprisoned for nonpayment of fine after 30 days upon the filing of an oath. It is most frequently the practice of our lower court judges to give either sentences or fines but seldom both. Therefore, I doubt very much that *Waller v. Florida* will seriously affect the administration of justice in the state of Oregon.

I would be interested in knowing the outcome of your litigation.

Very truly yours,

/s/ Lee Johnson  
LEE JOHNSON  
Attorney General

LJ/JBT/js

## EXHIBIT 21

[STATE SEAL]

THE ATTORNEY GENERAL  
OF TEXAS

Austin, Texas 78711

Crawford C. Martin  
Attorney General

November 12, 1970

Honorable David M. Pack  
Attorney General of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Dear Mr. Pack:

Thank you for your recent letter which General Martin referred, for research and reply, to me.

We regret very much to find that we can be of little assistance to you in responding to your inquiry concerning the case of *Waller v. Florida*, 397 U.S. 387 (1970). After careful reflection on how to obtain the information you desire, we are satisfied that the only accurate way to obtain it would be to check the prison records of each inmate presently incarcerated in the Texas Department of Corrections. We have approximately 13,600 inmates there, and have no way, other than by hand, to check each inmate's criminal history to determine whether he had been convicted of a municipal ordinance prior to his felony conviction, arising from the same set of facts.

If time permits, and if such information is crucial to your presentation in the Federal District Court, we will be pleased to consider undertaking such a study as is described above.

Yours very truly,

/s/ Jo Betsy Szebehely

(Mrs.) Jo Betsy Lewallen Szebehely  
Assistant Attorney General

JBLS/skt

## EXHIBIT 22

THE ATTORNEY GENERAL

[STATE SEAL]

STATE OF UTAH

State Capitol • Salt Lake City  
DA 8-5261Vernon B. Romney  
Attorney GeneralRobert B. Hansen  
Deputy Attorney General

November 17, 1970

Honorable David M. Pack  
Attorney General  
Supreme Court Building  
Nashville, Tennessee 37219Re: *Waller v. Florida*, 397 U.S. 387 (1970)

Dear General Pack:

Attorney General Vernon B. Romney referred to me your letter of October 29, 1970, wherein you inquired as to the effect of a retroactive application of the case of *Waller v. Florida*. I have endeavored to ascertain what, if any, effect this would have within the State of Utah.

I have discussed this with several judges, with the gentlemen in our local legal defender office, and with the record's people at the state prison. Thus far, I have not been able to find any cases where the retroactive application of *Waller* would release any individuals from our state prison.

Some time ago, there was a directive sent out to the county attorneys to, in all cases where it is possible, go for the biggest offense possible against an individual and forget the smaller offenses, unless they were lesser included offenses. For this reason, it has been the practice in this State to charge them with the felonies and

disregard any misdemeanors that could have been prosecuted in the justice's or city courts. This has led to what I now find the situation to be, that the retroactive application of *Waller* would have very little, if any, impact within the State of Utah.

Very truly yours,

/s/ Lauren N. Beasley  
LAUREN N. BEASLEY  
Chief Assistant Attorney General

LNB/sh

## EXHIBIT 23

James M. Jeffords  
Attorney General  
Fred I. Parker, Deputy

Louis P. Peck, Assistant  
Governmental Affairs  
Ronald H. Bean, Assistant  
Litigation  
John D. Hansen, Assistant  
Local Affairs

[STATE SEAL]

STATE OF VERMONT  
Office of the Attorney General  
Montpelier  
05602

Tel. 802—223-2311, Ext. 432

November 18, 1970

Honorable David M. Pack  
Attorney General  
State of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

Please pardon my delay in responding to your inquiry of October 29th relative to the local effect of *Waller v. Florida*, 397 U.S. 387 (1970).

To the best of my knowledge, all criminal quasi-criminal (motor vehicle, etc.) matters are prosecuted pursuant to State statute in Vermont. Hence, the problem of dual sovereignty, as between State and municipal governments, is and has been non-existent in this jurisdiction. It might be noted, additionally, that municipal courts have been abolished in Vermont and replaced by ten State district courts. Justices of the Peace still have a limited judicial function, but it is seldom exercised and will, in all likelihood, be abolished in the near future.

It was good to hear from you.

Most sincerely,

/s/ James M. Jeffords  
JAMES M. JEFFORDS  
Attorney General

JMJ/bg



## EXHIBIT 24

## COMMONWEALTH OF VIRGINIA

[STATE SEAL]

Andrew P. Miller  
Attorney General

M. Harris Parker  
Chief Deputy Attorney General

Reno S. Harp, III  
Deputy Attorney General

D. Gardiner Tyler  
William P. Bagwell, Jr.  
A. R. Woodroof  
Wm. Luke Witt  
Overton P. Pollard  
F. Lee Davis, Jr.  
William M. Phillips  
Troy G. Arnold, Jr.  
Anthony F. Troy  
Gerald L. Baliles  
Edward J. White  
Walter H. Ryland  
Walter A. McFarlane  
C. Tabor Cronk  
Vann H. Lefcoe  
Stuart H. Dunn  
Robert A. Johnson  
Theodore J. Markow  
Wm. Thomas Lehner  
Robert L. Simpson, Jr.  
Assistant Attorneys General

Office of the Attorney General  
Supreme Court Building  
1101 East Broad Street  
Richmond, Virginia 23219  
703—770-2071

November 16, 1970

Honorable David M. Pack  
Attorney General of Tennessee  
Nashville, Tennessee

Dear General Pack:

This is in response to your letter of October 29, 1970, inquiring as to what effect a retroactive application of *Waller v. Florida*, 397 U.S. 387 (1970) would have on

the administration of criminal justice in the State of Virginia.

I must advise that this decision should have little, if any, impact on convictions in Virginia, since the holding of *Waller v. Florida* is already embodied in the Code of Virginia, § 19.1-259, which provides as follows:

"If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a state and a federal statute, a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the state statute."

I might point out that under the first sentence of this section, a mere proceeding or prosecution which does not result in a conviction does not bar another prosecution in a state court. *Wheeler v. Commonwealth*, 180 Va. 888, 88 S.E. 2d 605; *Dykeman v. Commonwealth*, 201 Va. 807, 113 S.E. 2d 867.

I hope that this information has been of assistance to you.

Sincerely yours,

/s/ Andrew P. Miller  
ANDREW P. MILLER  
Attorney General

19:47

## EXHIBIT 25

[STATE SEAL]

## OFFICE OF THE ATTORNEY GENERAL

Slade Gordon Attorney General

Temple of Justice Olympia, Washington 98501

November 9, 1970

Honorable David M. Pack  
Attorney General  
State of Tennessee  
Nashville, Tennessee 37219

Dear General Pack:

This is response to your inquiry with regard to the effect that retroactive application of *Waller v. Florida*, 397 U.S. 387, 25 L ed 2d 435 (1970) would have in the state of Washington.

In *Waller* the court found that trial for a felony based on the same act as an earlier municipal court conviction for violation of a municipal ordinance constituted double jeopardy, and set aside the felony conviction.

In 1926, the Washington State Supreme Court, in *State v. Tucker*, 137 Wash. 162, 242 Pac. 363, held that an acquittal in in the municipal court of a violation of a city ordinance is not a bar to the subsequent prosecution by the state for the same offense in violation of the state law. You will note reference to this case in footnote number 3, page 439, 25 Led 2d (*Waller v. Florida*, *supra*,).

It appears that the *Tucker* case has remained the law in this state over the years on this particular point. Thus, it is quite possible that we may have persons serving felony sentences which could be affected by retroactive application of *Waller*. It would entail exhaustive research to tell you the number involved, if, indeed, such records are available.

If such a question is raised here in habeas corpus, and the facts are determined to be in line, we would urge prospective application only for the same reasons which the court set forth in *Linkletter, Johnson v. New Jersey*, and similar cases.

We hope our comments have been of some help to you.

Very truly yours,

FOR THE ATTORNEY GENERAL

/s/ Paul J. Murphy  
PAUL J. MURPHY  
Assistant Attorney General

PJM:bw

## EXHIBIT 26

[STATE SEAL]

Robert W. Warren  
Attorney GeneralTHE STATE OF WISCONSIN  
Department of Justice  
Madison

November 16, 1970

Honorable David M. Pack  
Attorney General  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

This is in reply to your letter of October 29, 1970, in which you inquire regarding the impact of a holding that *Waller v. Florida* is retroactive.

Notwithstanding *Milwaukee v. Johnson* (1927), 192 Wis. 585, 213 N.W. 335, it is not customary in Wisconsin to prosecute offenses under both local ordinances and the state criminal law. It would be my opinion, although no statistical data are available, that the impact of *Waller v. Florida* in this state is minimal if not non-existent from the point of view of both retroactive and prospective application.

The principal field in which local and state law overlap is that of traffic offenses, and whether the prosecution is brought under the state law or the local ordinance generally depends upon whether the arrest is made by a local or a state officer. Double prosecutions are, so far as I know, virtually unknown.

Very truly yours,

/s/ Robert W. Warren  
ROBERT W. WARREN  
Attorney General

RWW:ag

## EXHIBIT 27

[STATE SEAL]

OFFICE OF THE  
ATTORNEY GENERAL  
State of Wyoming  
210 Capitol Building  
Cheyenne, Wyoming 82001

James E. Barrett  
Attorney General

November 4, 1970

The Hon. David M. Pack  
Attorney General  
State of Tennessee  
Supreme Court Building  
Nashville, Tennessee 37219

Dear General Pack:

This will acknowledge receipt of your letter of October 29, 1970, wherein you request information relative to the effect of *Waller v. Florida* on criminal justice in the state of Wyoming.

Due to the fact that all initial criminal prosecutions in Wyoming are handled by the county and prosecuting attorneys of our twenty-three counties, it would be impossible to determine how many inmates presently incarcerated in the Wyoming Penitentiary have been previously tried for the same offense in municipal or justice of the peace court. It is my feeling, however, that retroactive application of *Waller v. Florida* would effect only three or four inmates. Prosecutions in Wyoming are generally brought under the state criminal statutes in district court without regard to violations of municipal ordinances where the offense committed violates both. I am in agreement that were conditions in Wyoming like those of many other states, *Waller v. Florida* when applied retroactively could have a far reaching effect on criminal justice.

Sincerely,

/s/ Fred C. Reed  
FRED C. REED  
Assistant Attorney General

FCR/b

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

—vs.—

WILLIAM S. NEIL, Warden,  
Tennessee State Penitentiary

MEMORANDUM—January 7, 1971

This is a proceeding upon a petition for a writ of habeas corpus wherein the petitioner seeks to set aside his convictions and sentences in three cases, each entitled *State of Tennessee v. Samuel Ed Robinson*, being Docket Nos. 103,810, 103,811, and 103,812 in the Criminal Court for Hamilton County, Tennessee.

It appears undisputed in this case that the petitioner was tried and convicted of three offenses of assault and battery in violation of an ordinance of the City of Chattanooga, and was fined \$50.00 and assessed costs upon each offense. Thereafter, on September 26, 1962, a grand jury of Hamilton County returned three indictments in each of the three cases, each charging petitioner with an offense of assault with intent to commit first degree murder. The occurrences giving rise to the three indictments were the same as those giving rise to the three city indictments. Upon petitioner's plea of guilty to the indictments, he received two sentences of three to ten years and one sentence of three to five years, such sentences to run consecutively. Upon July 12, 1966, petitioner filed a petition for a writ of habeas corpus in the Criminal Court for Davidson County, Tennessee, upon grounds of apparent jeopardy. The writ was denied. Petitioner appealed to the Tennessee Supreme Court, which affirmed the judgment below. Upon March 28, 1967, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of

Tennessee upon grounds of double jeopardy. This action was subsequently transferred to this court. By order dated May 15, 1967, this Court denied the writ. See *Samuel Ed Robinson v. C. Murray Henderson*, 268 F.Supp. 349 (E.D. Tenn., 1967). Basing its decision upon *Palko v. Connecticut*, (1937) 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, and the line of authority following the *Palko* decision, this Court concluded that the double jeopardy provision of the Fifth Amendment was not applicable to the states and that no Federal Constitutional error was alleged in the petition. Petitioner appealed to the Sixth Circuit Court of Appeals, which affirmed this Court's denial of the writ by order dated April 10, 1968.

The instant petition again raises the double jeopardy argument. As in the prior petition filed in 1967, the petitioner's sole contention in the instant case is that he was twice placed in jeopardy for the same offense and that the convictions and sentences resulting from the second trial are therefore invalid. The petitioner relies upon the recently decided Supreme Court case of *Waller v. Florida*, — U.S. —, 25 L.Ed.2d 435, 90 S.Ct. — (April 6, 1970). The facts, as stated above, being undisputed, the issue before the Court is one of law.

The facts in *Waller v. Florida* were as follows. Joseph Waller, together with a number of other persons, removed a canvas mural from the wall inside of the City Hall in St. Petersburg, Florida. As a result of this act, Mr. Waller was found guilty in municipal court of destruction of city property and disorderly breach of the peace and was sentenced to 180 days in the county jail. Subsequently, an information was filed against Mr. Waller charging him with grand larceny. Mr. Waller was found guilty of the charge, was sentenced six months to five years, less 170 days of the 180-day sentence imposed by the municipal court. It was undisputed that the same facts gave rise to the city and state charges placed against Mr. Waller. In discussing the applicability of the Fifth Amendment's prohibition against double jeopardy as applied to the States in *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the Court specifically held as follows:



"We decide only that the Florida courts were in error to the extent of holding that—

'... even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.'"

The Court concluded that the defendant's second trial based on the same facts giving rise to the municipal court trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution.

The relevant factual situation in the instant case and in *Waller* are substantially identical. The only legal problem presented is whether the holding in *Waller* should be applied retroactively. The petitioner contends that it should and in support of his legal position relies upon certain footnotes in *Waller v. Florida*, *supra*, and in *Ashe v. Swenson*, — U.S. —, — L.Ed.2d — (1970). The respondent on the other hand relies upon the criteria outlined in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, and *Desist v. United States*, — U.S. —, — S.Ct. —, 22 L.Ed.2d 248 (1969), and contends that in accordance with these criteria the decision in *Waller* should be applied prospectively only.

In the original memorandum filed by the Court upon September 22, 1970, this Court concluded after consideration of the relevant cases upon the double jeopardy question that:

Although there has never been a reasoned analysis by the Supreme Court on the issue of retroactivity, this Court can only conclude from the above review of the cases that *Benton v. Maryland* and *Waller v. Florida* should each be accorded fully retroactive application.

In view of this conclusion the Court provided that a judgment would enter setting aside the petitioner's convictions and sentences.

The respondent filed a timely motion to reconsider. Upon reconsideration of the original memorandum opinion and cases upon the subject and for the reasons stated in a memorandum filed upon October 27, 1970, this Court concluded:

"... that the retroactivity of *Waller v. Florida* has not been resolved by the Supreme Court and must therefore be determined on the basis of the criteria established by the Supreme Court in the cases of *Linkletter v. Walker*, 381 U.S. 618 (1965); *Stovall v. Denno*, 388 U.S. 293 (1967); and *Desist v. United States*, 394 U.S. 244 (1969)."

The Court thereupon set an evidentiary hearing to afford both parties an opportunity to submit any relevant evidence in support of their respective positions. Upon November 30, 1970, the respondent submitted certain statistical information for consideration by the Court in determining the impact of a retroactive application of the *Waller* case. The case has been briefed and argued and is now for decision by the Court.

In embarking upon this analysis of retrospective versus prospective effect of an overruling decision certain general principles have been clearly defined by the Supreme Court. The latest detailed pronouncement of these principles is to be found in *Desist v. United States*, 394 U.S. 244, 22 L.Ed.2d 248, 89 S.Ct. 1030 (1969), wherein Justice Stewart observed:

"Ever since *Linkletter v. Walker*, 381 U.S. 618, 629, 14 L.Ed.2d 601, 608, 85 S.Ct. 1731, established that 'the Constitution neither prohibits nor requires retrospective effect' for decisions expounding new constitutional rules affecting criminal trials, the Court has viewed the retroactivity or nonretroactivity of such decisions as a function of three considerations. As we most recently summarized them in *Stovall v. Denno*, 388 U.S. 293, 297, 18 L.Ed.2d 1199, 1203, 87 S.Ct. 1967, 'the criteria guiding resolution of the question implicate a) the purpose to be served by the new standards, b) the extent of the reliance by

law enforcement authorities on the old standards, and c) the effect on the administration of justice of a retroactive application of the new standards.'"

Accordingly, "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." See *Linkletter v. Walker*, *supra*. Applying the criteria outlined in the *Linkletter* case to the instant case, this Court must look to the history and purpose of the *Waller* rule; any reliance placed by the States upon the rule of law as it existed prior to *Waller*; and the effect on the administration of justice of a retrospective application of *Waller*.

In this regard the Court in *Desist v. United States*, *supra*, further outlines the relative importance of each criteria in weighing the relative merits of retroactivity.

"Foremost among these factors is the purpose to be served by the new constitutional rule. . . . It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity."

The first appropriate inquiry to be undertaken is an examination of the history and purpose of the *Waller* rule. In this regard, the specific holding of *Waller v. Florida*, *supra*, is as follows:

"We decide only that the Florida courts were in error to the extent of holding that—

' . . . even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.' "

The decision in the *Waller* case, holding that a municipal court conviction and a state court conviction of the same offense constitutes double jeopardy and is in violation of the Fifth and Fourteenth Amendments, is in turn based upon the prior decision of the Supreme Court in the case

of *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), wherein the Court overruled *Palko v. Connecticut*, *supra*, and held that the Fifth Amendment prohibition against double jeopardy was made applicable to the states through the Fourteenth Amendment.

In *Benton v. Maryland*, *supra*, the Court stated:

"... [W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled."

In examining the purpose of the *Waller* case it is well to note the rationale, history and purpose of *Benton v. Maryland* as outlined by Justice Marshall:

"The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. See *Bartkus v. Illinois*, 359 U.S. 121, 151-155, 3 L.Ed.2d 684, 705-707, 79 S.Ct. 676 (1959, Black, J., dissenting). As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. '[T]he plea of autrefois acquit, or a former acquittal,' he wrote, 'is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense.' Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court put it in *Green v. United States*, 355 U.S. 184, 187-188, 2 L.Ed.2d 199, 204, 78 S.Ct. 221, 61 A.L.R.2d 1119 (1957), '[T]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an indi-

vidual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice.' The validity of petitioner's larceny conviction must be judged not by the watered-down standard enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment double jeopardy provision."

*Waller v. Florida* is simply an expansion of the newly announced principles in *Benton v. Maryland*. In abrogating the "dual sovereignty" theory with regard to municipal and state charges based upon the identical offense, the Court relied upon the holding in *Benton* for the proposition that the Fifth Amendment prohibition against double jeopardy applied to the states. While recognizing that successive prosecutions by state and federal governments had been held to be non-violative of the Double Jeopardy Clause, since dual sovereignties are involved [see *Fox v. Ohio*, 5 How. 410, 12 L.Ed. 213 (1847); *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1969); *Abbate v. United States*, 359 U.S. 187, 3 L.Ed.2d 729, 79 S.Ct. 666 (1969)], the Court held these cases inapplicable in a situation where the successive prosecutions were by municipal and state governments, both arms of the same sovereignty. Rather, in *Waller* the Court followed the rule previously established in the case of *Grafton v. United States*, 206 U.S. 333, 51 L.Ed. 1084, 27 S.Ct. 749 (1907), wherein it had been held that "a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court (Philippine Islands), since both are arms of the same sovereignty."

Having pointed out the reliance placed in *Waller* upon the prior decisions of *Benton v. Maryland*, *supra*, and *Grafton v. United States*, *supra*, two observations are appropriate.

One observation is that the retroactivity of the *Benton* decision has been decided and that case has been held to be "fully retroactive." See footnotes in both *Ashe v. Swenson*, — U.S. —, — S.Ct. —, 25 L.Ed.2d 469 (1970), and *Waller v. Florida*, *supra*. Further, three circuits have considered the issue and have held *Benton* to be fully retroactive. See *Mulreed v. Kropp*, 425 F.2d 1095 (C.A. 6, 1970); *Booker v. Phillips*, 428 F.2d 420 (C.A. 4, 1970); and *Galloway v. Beto*, 421 F.2d 284 (C.A. 5, 1970). In the *Mulreed* case, *supra*, the Sixth Circuit reasoned the issue of retroactivity as follows:

"We think this case (*Benton*) goes beyond the concededly important consideration of the integrity of the truth determining process; it goes to the very quick of a very long and cherished heritage in the administration of criminal justice, namely the sometimes extended deprivation of liberty as the price for demanding successfully a trial process free of constitutional infirmity. Therefore we conclude that *Benton* applies retroactively and is controlling here."

Although the retroactivity of the *Benton* decision is not necessarily determinative of the issue presented in the present case, that is, whether *Waller v. Florida* should be accorded retroactive effect, it is obvious that the reasoning which accords retroactivity to *Benton* must be given weighty consideration in determining the retroactivity of *Waller v. Florida*.

A second observation appropriate at this point is that *Waller v. Florida* overrules no previous federal judicial precedent. Rather, it relies upon a reassertion of the principles laid down in the 1907 decision of *Grafton v. United States*, 206 U.S. 333, 51 L.Ed. 1084, 27 S.Ct. 749. Accordingly, the *Waller* decision establishes no new federal constitutional interpretation except to the extent that it may overrule some local or state court decision to the contrary.

When the foregoing two observations are jointly considered, they appear to be tantamount to a prior adjudication upon the issue now before the Court and to re-



quire that *Waller v. Florida* be given fully retroactive effect. To the extent that the *Waller* decision asserts the double jeopardy rule of *Benton v. Maryland*, the issue of retroactivity has been adjudicated. To the extent that the *Waller* decision asserts the rule of *Grafton v. United States* to deny any dual sovereignty between a state and its municipalities, no new federal constitutional law is established and no former federal precedent is overruled.

A consideration of the two remaining criteria for determining the issue of retroactivity, that is, the reliance placed by law enforcement officials upon a contrary rule and the effect on the administration of justice of a retroactive application, would appear to be precluded under the foregoing discussion of Supreme Court decisions, for their analysis is appropriate only where retroactivity remains in question after a consideration of the initial criteria. See *Desist v. United States*, *supra*.

It may be noted in this regard that Chief Justice Burger in a footnote to his opinion in the *Waller* case (see footnote #3) lists 21 states which currently treat municipalities and the state as separate sovereigns for double jeopardy purposes. Obviously the State of Florida may be added to this list; so, too, may the State of Tennessee. See *Mullins v. State*, 214 Tenn. 366, 380 S.W. 2d 201 (1964); *Greenwood v. State*, 65 Tenn. 557 (1873). While in a very real sense these state decisions are overruled by the *Waller* case, the states cannot be said in any sense to have relied upon a federal precedent in establishing their rule, as the federal precedent of *Grafton v. United States* was to the contrary, as pointed out in the *Waller* decision.

Although an examination of the impact of the *Waller* decision is precluded in accordance with the foregoing discussion of the authorities, it may be noted that the respondent has submitted certain data regarding this impact, consisting of responses received from law enforcement authorities in the various jurisdictions previously following the dual sovereignty rule. Disregarding any issue of admissibility of the data in its present form, it may be noted that the responding officials from ten

states previously following the dual sovereignty rule expressed the opinion that the *Waller* decision would have little or no effect on the administration of justice in their state (Alabama, Illinois, Idaho, Mississippi, Missouri, Nevada, Nebraska, Oregon, Wisconsin and Wyoming). Four expressed the opinion that sufficient data was not available to make an evaluation (Colorado, Minnesota, North Dakota and Oklahoma). And no response was received from seven states (Alaska, Iowa, Kansas, Louisiana, Ohio, South Dakota and Florida). Only the responses from two states (Tennessee and Washington) expressed the opinion that there would be a substantial effect on the administration of justice by a retroactive application of the *Waller* decision. Except upon the local level within this jurisdiction, the data submitted does not appear to satisfactorily establish a preference either for or against retroactivity.

A judgment will accordingly enter setting aside the petitioner's convictions and sentences in Criminal Docket Nos. 103,810, 103,811, and 103,812 in the Criminal Court for Hamilton County, Tennessee, and the petitioner will be forthwith released from custody by reason of the said convictions and sentences; PROVIDED, however, that release of the petitioner will be stayed for a period of ten (10) days following the entry of the judgment on this opinion to permit the respondent time within which to elect whether he shall take an appeal herein or seek any further stay from the appellate court. Should no appeal be filed within ten days, the petitioner will be forthwith released without further conditions upon his release. Should an appeal be filed within ten days, then, pursuant to Rule 23(c), *Federal Rules of Appellate Procedure*, the petitioner, as a condition to his release, will be required to file a bail bond in the sum of \$1,000.00 with good and sufficient surety thereon, such bond to be returnable to this Court and conditioned in the usual form.

/s/ Frank W. Wilson  
United States District Judge



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden,  
Tennessee State Penitentiary

ORDER—January 7, 1971

This is a proceeding upon a petition for a writ of habeas corpus. The petitioner, Samuel Ed Robinson, avers that he is being illegally held in confinement by the State of Tennessee and seeks to set aside his convictions and sentences in three state court cases, each entitled "*State of Tennessee v. Samuel Ed. Robinson*," and being Dockets #103,810, #103,811, and #103,812 in the Criminal Court for Hamilton County, Tennessee. The petitioner was indicted in each of the aforesaid state court cases for assault with intent to commit murder and entered pleas of guilty thereto and was sentenced to two consecutive sentences of two to ten years and one consecutive sentence of three to five years. It is averred by the petitioner that prior to his state court indictments and convictions in the three cases here under attack the petitioner had previously been tried and convicted for three offenses of assault and battery in violation of an ordinance of the City of Chattanooga, Tennessee, the three municipal court convictions having arisen out of the occurrences giving rise to the three state court convictions. The petitioner's sole contention is that, in accordance with the recent decision in the case of *Waller v. Florida*, — U.S. —, 25 L.Ed.2d 435, 90 S.Ct. — (April 6, 1970), he was twice placed in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments of the United States Constitution and that he is accordingly entitled to have his three aforesaid state

court convictions set aside and to be released from custody thereunder. An answer was filed on behalf of the respondent conceding the correctness of the petitioner's allegations regarding his convictions in both the municipal court and in the state court cases, but denying that the state court convictions were in violation of the Fifth and Fourteenth Amendments of the Federal Constitution as those amendments were interpreted at the time of the petitioner's three state court convictions (1962), and further denying that the recent (1970) decision to the contrary in the case of *Waller v. Florida, supra*, should be given retroactive effect so as to render the petitioner's convictions invalid. All facts in regard to the petitioner's convictions in both the municipal and the state court having been admitted and an evidentiary hearing having been conducted upon all matters relating to the issue of whether retroactive effect should be given to the decision in the case of *Waller v. Florida, supra*, the Court is of the opinion that the decision in the case of *Waller v. Florida* must be given retroactive effect, all for the reasons set forth in an opinion filed herein, and that the convictions and sentences of the petitioner in the state court here in issue must be set aside and the petitioner released from custody thereunder.

It is accordingly ORDERED that the convictions of Samuel Ed Robinson in the three cases of *State of Tennessee v. Samuel Ed Robinson*, Dockets #103,810, #103,811, and #103,812 in the Criminal Court for Hamilton County, Tennessee, are void and of no further force or effect. It is FURTHER ORDERED that the said Samuel Ed Robinson be forthwith released from any custody by reason of the aforesaid state court convictions; PROVIDED, however, that the release of Samuel Ed Robinson pursuant to this order be stayed for a period of ten (10) days following the entry hereof to permit the respondent time within which to elect whether he shall take an appeal herein or seek any further stay from the appellate court; and PROVIDED FURTHER that should an appeal be filed within ten (10) days of the entry of this order, then, pursuant to Rule 23(c), *Federal Rules of Appellate Procedure*, the petitioner, as a condition of

his release, will be required to file a bail bond in the sum of \$1,000.00 with good and sufficient surety thereon, such bond to be returnable to this Court and to be conditioned in the usual form; and PROVIDED FURTHER that should no appeal be filed within ten (10) days of the entry of this order the petitioner will be forthwith released without further conditions upon his release, but subject to any further orders hereinafter entered in this cause.

APPROVED FOR ENTRY.

/s/ Frank W. Wilson  
United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
SOUTHERN DIVISION**

**Civil Action No. 5887**

**SAMUEL ED ROBINSON, PETITIONER**

**VS.**

**WILLIAM S. NEIL, Warden  
Tennessee State Penitentiary, RESPONDENT**

**NOTICE OF APPEAL**

Notice is hereby given that William S. Neil, Warden, respondent in the above named action, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order of the District Court setting aside the State convictions and sentences of petitioner and releasing him from custody of Tennessee authorities, entered in this action on the 7th day of January, 1971.

/s/ Edward E. Davis  
EDWARD E. DAVIS  
District Attorney General  
Room 305 Courthouse  
Chattanooga, Tennessee 37402  
Of Counsel for Respondent.

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

No. 71-1138

AMUEL ED. ROBINSON, PETITIONER-APPELLEE,

vs.

BEFORE

WILLIAM S. NEIL, Warden, Tennessee  
State Penitentiary, RESPONDENT-APPELLANT.

APPE: PHILLIPS, Chief Judge, PECK, Circuit  
the Es Judge and CECIL, Senior Circuit Judge.

THE

JUDGMENT

the U.S. District Court for  
of Tennessee.

ON CAUSE came on to be heard on the record from  
ordered States District Court for the Eastern District  
of Tennessee and was argued by counsel.

It IS CONSIDERATION WHEREFOR, It is now here  
cover and adjudged by this Court that the judgment  
item is said District Court in this cause be and the same  
said by reversed.

En further ordered that Respondent-Appellant re-  
from Petitioner-Appellee the costs on appeal, as  
below, and that execution therefor issue out of  
District Court.

ordered by order of the Court.

/s/ James A. Higgins  
JAMES A. HIGGINS  
Clerk

A True Copy.

Attest:

/s/ James A. Higgins  
JAMES A. HIGGINS  
Clerk

Issued  
COS  
Filed  
Print

as Mandate: January 5, 1972

S: NONE

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Total	_____	\$

No. 71-1138

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

SAMUEL ED ROBINSON, PETITIONER-APPELLEE,

v.

WILLIAM S. NEIL, Warden, Tennessee  
State Penitentiary, RESPONDENT-APPELLANT.ON APPEAL from the United States District Court for the  
Eastern District of Tennessee, Southern Division.

Decided and Filed December 10, 1971.

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge,  
and CECIL, Senior Circuit Judge.

PECK, Circuit Judge. The sole issue presented by this appeal is whether the recent United States Supreme Court decision, *Waller v. Florida*, 397 U.S. 387 (1970), declaring an end to the "dual sovereignty" theory with respect to criminal prosecutions by the States, should be accorded retroactive application. That decision, hereinafter discussed in detail, reversed a state court judgment of conviction based on an offense which had been the basis of an earlier municipal court conviction. The District Court for the Eastern District of Tennessee granted appellee Robinson's petition for a writ of habeas corpus and held that *Waller* should be applied retroactively. *Robinson v. Neil*, 320 F. Supp. 894 (E.D. Tenn. 1971)

The facts pertaining to the instant action are not complicated. In 1962, appellee was tried and convicted in the municipal court of three assault and battery offenses in violation of a Chattanooga, Tennessee ordinance, and was fined \$50.00 and costs for each offense. Subsequently, he was named in three indictments charging assault with intent to commit first degree murder, arising out of the same facts resulting in the municipal convictions. Fol-

lowing arraignment in the state court of general jurisdiction, he pled guilty to each charge and received two consecutive sentences of two to ten years and one consecutive sentence of three to five years. He is presently confined in the Tennessee State Penitentiary, pursuant to the state court convictions.

In July, 1966, appellee filed a petition for writ of habeas corpus in the Criminal Court of Davidson County, Tennessee, contending that the state court convictions violated the double jeopardy guarantee in that they stemmed from the same facts and circumstances as his municipal court convictions. The petition was denied by the Criminal Court of Davidson County and the denial was affirmed by the Tennessee Supreme Court. In March, 1967, he filed a petition for habeas corpus relief in the District Court, advancing the double jeopardy argument. That court denied the petition on the ground that under *Palko v. Connecticut*, 302 U.S. 319 (1937), the Fifth Amendment double jeopardy provision was not applicable to the States through the Fourteenth Amendment. *Robinson v. Henderson*, 268 F. Supp. 349 (E.D. Tenn. 1967), *aff'd*, 391 F. 2d 933 (6th Cir. 1968). This court affirmed that determination by order dated April 10, 1968.

Soon thereafter, *Palko v. Connecticut*, *supra*, was overruled by the Supreme Court in *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the Fifth Amendment double jeopardy provision is applicable to the States through the Fourteenth Amendment. With *Benton* as precedent, the Supreme Court granted certiorari in *Waller v. Florida*, *supra*, to test "the asserted power of [both a municipal court and a state court] within one State to place [a person] on trial for the same alleged crime." 397 U.S. at 390. As previously indicated, *Waller* held such multiple prosecutions to be violative of the Fifth Amendment, which leads us to the present case. In appellee's petition to the District Court, he stated that he had been tried and convicted by both the City of Chattanooga and the State of Tennessee for the same offense, and on authority of *Waller*, requested that his state conviction be overturned. *Waller*, however, left



open the question of whether the rule announced therein is to be given retroactive effect, leaving us free to decide that issue on its merits.

The *Benton* decision making the double jeopardy provision applicable to the States has been given full retroactivity. The Supreme Court stated in a footnote in *Ashe v. Swenson*, 397 U.S. 436 (1970), decided the same day as *Waller*, that: "There can be no doubt of the 'retroactivity' of the Court's decision in *Benton v. Maryland*. In *North Carolina v. Pearce*, 395 U.S. 711, decided the same day as *Benton*, the Court unanimously accorded fully 'retroactive' effect to the *Benton* doctrine." 397 U.S. at 437, n. 1.<sup>1</sup> Furthermore, this court reached the identical conclusion in *Mulreed v. Koop*, 425 F. 2d 1095 (6th Cir. 1970). See also, *Booker v. Phillips*, 428 F. 2d 420 (4th Cir. 1970); and *Galloway v. Beto*, 421 F. 2d 284 (5th Cir. 1970).

In finding retroactivity of the *Waller* rule in the instant case, the District Court placed great weight on the rationale of *Benton* and the rationale which was persuasive in making *Benton* retroactive.<sup>2</sup> The District Judge quoted a passage from Mr. Justice Marshall's opinion in *Benton*, which is illustrative of the long and cherished heritage enjoyed by the double jeopardy guarantee in our system of justice. *Robinson v. Neil*, *supra*, 320 F. Supp. at 897. The Court then made two observations: (1) "[T]he retroactivity of the *Benton* decision has been decided and that case has been held to be 'fully retroactive,'" and (2) "*Waller v. Florida* overrules no previous federal judicial precedent." From this, the Court concluded: "When the foregoing two observations are jointly considered, they appear to be tantamount to a prior adjudication upon the issue [of retroactivity] and to require that *Waller v. Florida* be given fully retroactive effect." *Robinson v. Neil*, *supra*, 320 F. Supp. at 898. While we agree that the purpose of the *Waller*

<sup>1</sup> The Court also stated that *Benton* has full retroactivity in a footnote in *Price v. Georgia*, 398 U.S. 323, 330-31, n. 9 (1970).

<sup>2</sup> Even though the Supreme Court has never given its rationale for making *Benton* retroactive, the District Court relied upon the rationale of our decision in *Mulreed v. Kroop*, *supra*, 425 F.2d 1095.



rule is decisive of the issue of retroactivity in the present case, in our opinion the District Court herein was unduly swayed by the history and purpose of the double jeopardy guarantee applied to test *Waller*, rather than by the history and purpose of the *Waller* rule itself.

In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Supreme Court established that the test of retroactivity is concerned with the purpose of the specific rule under consideration, rather than with the particular constitutional right involved:

"We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved.

\* \* \*

"We also stress that the retroactivity or non-retroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based \* \* \* [W]e must determine retroactivity 'in each case' by looking to the particular traits of the specific 'rule in question.'" 384 U.S. at 728. (Emphasis supplied.)

With this in mind we return to *Waller*. Petitioner, Joseph Waller, Jr., was arrested and charged in St. Petersburg, Florida, with violation of two city ordinances for taking a mural from the St. Petersburg City Hall and carrying it through the streets in a damaged condition. He was found guilty on both charges in the St. Petersburg Municipal Court and was sentenced to 180 days imprisonment. He was then tried and convicted on a charge of grand larceny for the same acts by the State of Florida and received a sentence of six months to five years, less 170 days of the 180 day municipal sentence.

*Waller* appealed to the District Court of Appeal of Florida and that court upheld each of the convictions on the ground that under Florida precedent, trial and conviction for the same offense in both a municipal court and a state court does not constitute double jeopardy. Following denial of certiorari by the Florida Supreme

Court, the United States Supreme Court granted certiorari and reversed his state court convictions.

In the Supreme Court, the State of Florida contended that municipalities and the State are separate sovereigns, permitting each to punish persons for the same crime. Florida argued that since the Supreme Court ruled in *Bartkus v. Illinois*, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959), that successive prosecutions by a state court and a federal court for the same crime are constitutionally permissible as punishment by separate sovereigns, the same result should follow for the municipality and the State. The Supreme Court rejected Florida's argument, indicating that such reliance upon *Bartkus* and *Abbate* and their predecessor, *Fox v. Ohio*, 5 How. 410 (1847), was erroneous. The Court cited *Reynolds v. Sims*, 377 U.S. 533 (1964), for the proposition that municipalities have never been considered separate sovereignties from the State, but rather are political subdivisions thereof. The Court stated:

"[The proper analogy] is to be found in the relationship between the government of a Territory and the Government of the United States. The legal consequence of that relationship was settled in *Grafton v. United States*, 206 U.S. 333 (1907) where [it was] held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign." 397 U.S. at 393.

Thereinafter, the *Waller* Court concluded:

"Thus *Grafton*, not *Fox v. Ohio*, *supra*, or its progeny, *Bartkus v. Illinois*, *supra*, or *Abbate v. United States*, *supra*, controls, and we hold that on the basis of the facts upon which the Florida District Court of Appeal relied petitioner could not lawfully be tried both by the municipal government and by the State of Florida. In this context a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution.

"We decide only that the Florida courts were in error to the extent of holding that—

'even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.' 397 U.S. at 394-95.

From this, it is readily apparent that the purpose of the *Waller* rule is to put an end to successive prosecutions by municipal and state governments based on the same offense and to establish for purposes of criminal prosecutions or whatever, that municipalities are political subdivisions of the States possessing a relationship similar to the relationship between the federal government and its territories. Though all States have some form of the double jeopardy guarantee, either constitutional, statutory or common law (*Mulreed v. Kroop*, *supra*, 425 F. 2d at 1098), the *Waller* Court noted that nearly half of them permitted multiple prosecutions by municipalities and the State at the time of its decision. 397 U.S. at 391, n. 3. Thus, *Waller* simply compelled the States to abandon the long tolerated practice of successive prosecutions based on standards of double jeopardy.

*Linkletter v. Walker*, 381 U.S. 618 (1965), requires that in resolving a retroactivity issue we must consider the purpose of the new rule, the reliance placed on the old rule, and the effect on the administration of justice of a retroactive application of the new rule. And in *Desist v. United States*, 394 U.S. 244 (1969), the Supreme Court stated that "Foremost among [the *Linkletter*] factors is the purpose to be served by the new constitutional rule." 394 U.S. at 249. The Court in *Desist* further stated " \* \* \* we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity." 394 U.S. at 251.

In both *Linkletter* and *Desist*, which involved the retroactivity of evidentiary exclusionary rules under the Fourth Amendment, the Supreme Court emphasized that the

purpose of the new rules was to act as a deterrent to illegal police action and that such purpose would not be furthered, nor would past misconduct be corrected by releasing all the prisoners whose convictions were not in accordance with the Fourth Amendment. 394 U.S. at 249. The prisoners involved, though victims of a constitutional violation, were admittedly guilty and the purpose of the rule would not be served by their release. 381 U.S. 637.

In the most recent Supreme Court decisions on retroactivity, *Williams v. United States*, and *Elkanich v. United States*, 401 U.S. 646 (1971), involving the retroactivity of *Chimel v. California*, 395 U.S. 752 (1969), under the Fourth Amendment and *Mackey v. United States*, 401 U.S. 667 (1971), involving the retroactivity of *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), under the Fifth Amendment, the Court reiterated *Linkletter* and *Desist*, stating that the relevant inquiry is whether the rule is aimed at the fundamental fairness of the result of trials or is designed "to serve other ends." *Williams v. United States*, *supra*, 401 U.S. at 653. The Court stated:

"The petitioners in both *Linkletter* and *Desist* were convicted in proceedings that conformed to all then-applicable constitutional norms. In both cases the government involved had a concededly guilty defendant in custody and substantial unsatisfied interests in achieving with respect to such defendant whatever deterrent and rehabilitative goals underlay its criminal justice system.

• • • •

"[T]he authorities violated neither of petitioner's rights either before or at trial. No claim was made that the evidence against them was constitutionally insufficient to prove their guilt." 401 U.S. at 654, 656.

The Court found that the circumstances in *Williams*, *Elkanich* and *Mackey* were similar to those in *Linkletter* and *Desist* and accordingly denied retroactivity.

It is readily apparent that, in the present case, the integrity of the fact-finding process at trial is not under attack by the new rule. The occurrence of multiple prosecutions in the context of the instant case did not result in the imprisonment of concededly innocent people. Thus, we can see no good reason for the adoption of a rule which would free persons subjected to such prosecutions in the past. If this were done, the convictions for relatively minor offenses carrying relatively minor penalties would be left standing, while convictions for the far more serious offenses carrying far more severe penalties would be overturned on a wholesale basis. Indeed, an injustice would be worked on the citizens of those States if we were to deny to the States the opportunity to exact whatever rehabilitative measures have been deemed proper for the convicted persons involved.

We conclude that the purpose of *Waller* will be properly served by granting the new rule prospective effect only. The States were mandated by that decision to revamp their criminal laws and procedures to conform with the constitutional requirements pursuant to the double jeopardy guarantee. This is all that is needed to implement sufficiently the new rule insuring abolition of the "dual sovereignty" theory, and its resulting allowance of multiple prosecutions.

In light of the foregoing, we need not discuss the remaining two factors, reliance on the old rule and effect on the administration of justice of retroactive application of the new rule. However, these factors too favor non-retroactivity and since they are closely related to the first factor, some comment on them is appropriate.

On reliance, we note first that until *Waller* the Supreme Court had never decided whether multiple prosecutions by a municipal court and the state court constitute double jeopardy. If the States were relying solely on *Palko v. Connecticut*, *supra*, holding the double jeopardy guarantee inapplicable to the States, such reliance would appear to have been unjustified. See *Mulreed v. Kroop*, *supra*, 425 F. Supp. at 1098-99. But the States were also relying upon the "dual sovereignty" analogy between the municipal-state relationship and the state-federal re-

lationship expounded in *Waller*. See e.g., *Thiesen v. McDavid*, 34 Fla. 440, 16 So. 321 (1894). This reliance proved unfounded, yet it cannot be said that it was clearly unjustified. As recently as 1967, a Louisiana District Court in *Louisiana ex rel. Ladd v. Middlebrooks*, 270 F. Supp. 295 (E.D. La. 1967), upheld multiple prosecutions by municipalities and the State based on the "dual sovereignty" analogy to the state-federal relationship.

Other theories have been advanced to justify multiple prosecutions. See Note, 68 MICH. L. REV. 336, 338 (1969). These theories argue, for example, that municipal offenses are too petty to be considered criminal prosecutions or that municipal interests and state interests are sufficiently different in their purposes as to require successive prosecutions. Though each of the theories may have been opposed by better reasoned arguments, the lack of federal law in this area prior to *Benton* and *Waller* left them open for some consideration and support.

As for the impact on the administration of justice by according *Waller* retroactivity, the District Court herein stated that at least two States (Tennessee and Washington), reported in a survey that they would be substantially effected and seven other States (Alaska, Iowa, Kansas, Louisiana, Ohio, South Dakota, and Florida), failed to report what effect it would have on them. *Robinson v. Neil*, *supra*, 320 F. Supp. at 899. With nine States possibly realizing a substantial effect and many others permitting multiple prosecutions, we think that, without more positive data, nonretroactivity is favored. In *Tehan v. United States ex rel. Scott*, 382 U.S. 406 (1966), the Supreme Court found nonretroactivity to be favored even though only six States were involved and data was not available to determine the actual number of cases effected within those six States. 382 U.S. at 417-18.

Reversed.



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
SOUTHERN DIVISION

Civil Action No. 5887

SAMUEL ED ROBINSON

vs.

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary

ORDER ON MANDATE

The respondent, William S. Neil, Warden, having appealed to the United States Court of Appeals for the Sixth Circuit, from an order entered in this cause on January 7, 1971 in which the convictions of petitioner SAMUEL ED ROBINSON in three cases, all styled *State of Tennessee v. Samuel Ed Robinson*, Docket numbers 103810, 103811 and 103812 in the Criminal Court for Hamilton County, Tennessee were declared by this court to be void and of no further force and effect; and that the said SAMUEL ED ROBINSON be forthwith released from any custody by reason of the aforesaid state court convictions; and further providing that should an appeal be taken from such order within ten (10) days then petitioner, as a condition of his release would be required to file a bail bond in the amount of \$1,000.00 with good and sufficient surety thereon returnable to this Court and conditioned in the usual form; and the said Court having entered its order of judgement on December 10, 1971, which was issued as mandate on January 5, 1972 and filed by the Clerk on January 10, 1972, wherein it was ordered that the judgement of the District Court was reversed.

NOW, THEREFORE, upon the mandate of the United States Court of Appeals for the Sixth Circuit, IT IS ORDERED that the judgement of the District Court as set out in its order in this case dated January 7, 1971 be, and it hereby is, reversed.

IT IS FURTHER ORDERED that the convictions heretofore set out by docket numbers in the state court be, and they hereby are reinstated and declared to be in full force and effect.

IT IS FURTHER ORDERED that if petitioner has not heretofore been released by the respondent under the former order of this court that he will not hereafter be released by reason of such order. If petitioner has been released by virtue of said order under any of the conditions and provisions therein made for bail bond, that such bond shall be, and hereby is, cancelled and revoked and petitioner will immediately be returned to the custody of respondent.

APPROVED FOR ENTRY

/s/ Frank W. Wilson  
FRANK W. WILSON  
United States District Judge

CORRECT:

/s/ David Pack  
DAVID PACK  
For Respondent-Appellant  
David Pack—Attorney General  
State of Tennessee

/s/ Edward E. Davis  
EDWARD E. DAVIS  
For Respondent-Appellant  
District Attorney, Of Counsel

/s/ James D. Robinson  
JAMES D. ROBINSON  
For Petitioner-Appellee



## SUPREME COURT OF THE UNITED STATES

No. 71-6272

SAMUEL ED ROBINSON, PETITIONER

v.

WILLIAM S. NEIL, Warden

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 15, 1972



**FILE COPY**

JUL 14 1971

IN THE

MICHAEL RODAK, JR.

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6272

SAMUEL ED ROBINSON,

*Petitioner,*

v.

WILLIAM S. NEIL, Warden,  
Tennessee State Penitentiary,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

## BRIEF FOR THE PETITIONER

JERRY H. SUMMERS

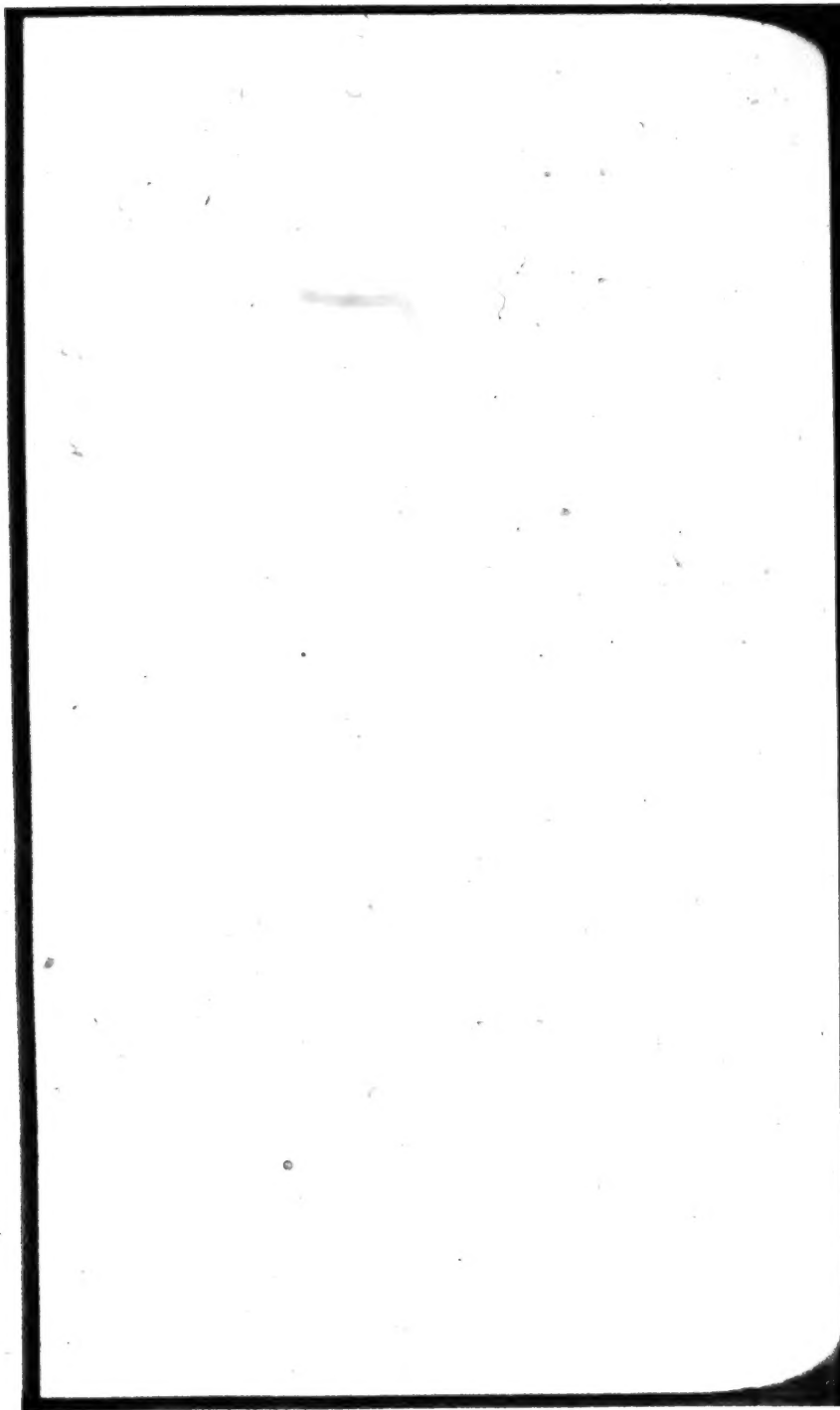
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*Co-Counsel for Petitioner*

PETITION NOT PRINTED  
RESPONSE NOT PRINTED



(i)

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

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**No. 71-6272**

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**SAMUEL ED ROBINSON,**

*Petitioner,*

v.

**WILLIAM S. NEIL, Warden,  
Tennessee State Penitentiary,**

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**BRIEF FOR THE PETITIONER**

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**OPINION BELOW**

The opinion of the Court of Appeals below (App. p. 80) is reported in 452 F.2d 370 (1971). The opinion of the District Court below (App. p. 65) is reported in 320 F. Supp. 894 (E.D. Tenn. 1971).

## JURISDICTION

The judgment of the Court below (App. p. 79) was entered on December 10, 1971. Notice of appeal was filed in the Court of Appeals for the Sixth Circuit on February 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.A., §1259(1).

## QUESTIONS PRESENTED FOR REVIEW

The sole issue presented by this appeal is whether the recent United States Supreme Court decision, *Waller v. Florida*, 397 U.S. 387 (1970), declaring an end to the "dual sovereignty" theory with respect to criminal prosecutions by the states, should be accorded retroactive application.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment, United States Constitution.
2. The Fourteenth Amendment, United States Constitution.

### Amendment 5:

*Criminal actions—Provisions concerning—Due process of law and just compensation clauses—*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation.

Amendment 14:

*Citizenship—Due process of law—Equal protection.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### STATEMENT OF FACTS

The petitioner was tried and convicted of assault and battery for violation of an ordinance in the City Court of Chattanooga in three cases and was fined \$50.00 and costs on each offense. Thereafter, the petitioner was indicted by the Grand Jury of Hamilton County, Tennessee, in September, 1962, in three cases charging the offense of assault with intent to commit first degree murder. The occurrence giving rise to these three indictments were the same as those giving rise to the three city charges. The petitioner pleaded guilty to all three cases in the Criminal Court of Hamilton County, Tennessee, and received two sentences of three to ten years and one sentence of three to five years, with the sentences to run consecutively. The petitioner is presently in custody of respondent Warden, Tennessee State Penitentiary, pursuant to the sentences imposed in the Criminal Court of Hamilton County, Tennessee. In July, 1966, the peti-

tioner filed a petition for writ of habeas corpus in the Criminal Court of Davidson County, Tennessee, contending double jeopardy in the Criminal Court of Hamilton County due to the fact he had been convicted of assault and battery in the City Court of Chattanooga and was fined in three cases arising out of the same facts and circumstances. This petition for writ of habeas corpus was denied in the Criminal Court of Davidson County. An appeal of this ruling was perfected to the Tennessee Supreme Court and the denial of the writ was affirmed. Thereafter, the petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee, Nashville Division, contending he was placed twice in jeopardy for the same offenses and the convictions and sentences imposed in the Criminal Court of Hamilton County, Tennessee, were invalid and unconstitutional. The case was transferred to the United States District Court for the Eastern District of Tennessee, Southern Division. After due consideration, the Honorable Frank W. Wilson Judge, United States District Court for the Eastern District of Tennessee, Southern Division, entered a final order on June 23, 1967, dismissing the petition for habeas corpus. The petitioner herein appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court's denial of the writ order dated April 10, 1968. Thereafter, in April, 1970, the petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee, Southern Division, raising again the double jeopardy matter, contending he was twice placed in jeopardy for the same offense and that the sentences resulting from the second trial were invalid. The petitioner in this petition relied upon the April 6, 1970, Supreme Court case of *Waller v.*

*Florida*, 397 U.S. 387 (1970) (App. p. 1). After due consideration, the Honorable Frank W. Wilson, Judge, United States District Court for the Eastern District of Tennessee, Southern Division, sustained the petition for writ of habeas corpus (App. p. 75). Thereafter, respondent appealed that decision to the United States Court of Appeals for the Sixth Circuit, who reversed the decision of the District Court on December 10, 1971 (App. p. 79). On February 24, 1972, Notice of Appeal was filed in the United States Court of Appeals for the Sixth Circuit.

#### ARGUMENT AND AUTHORITIES

**THE COURT OF APPEALS FOR THE SIXTH CIRCUIT WAS IN ERROR IN REVERSING THE DISTRICT COURT'S HOLDING THAT *WALLER V. FLORIDA* SHOULD BE ACCORDED RETROACTIVE APPLICATION. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.**

In *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed. 2d 435 (1970), the Supreme Court considered the narrow issue of whether a person can be put to trial for the same crime in two different courts within the same state. The Defendant, Waller, along with several others, removed a mural from a wall inside the City Hall of St. Petersburg, Florida. After removing the mural, they carried it through the streets where they were confronted by police officers. After a scuffle with the officers, the mural was recovered but in a damaged condition. Waller was charged by the city with violating two city ordinances, destruction of city property and breach of the peace, and after conviction on both charges in the

municipal court, was sentenced to 180 days. The State of Florida then filed a felony information charging Waller with grand larceny. Prior to trial, Waller petitioned the Supreme Court of Florida for a writ of prohibition asserting the double jeopardy clause barred the state prosecution, but relief was denied. Waller was again found guilty and received a sentence of six months to five years less 170 days of the 180 day sentence previously imposed. It was undisputed the city and state charges both grew out of the same occurrence or conduct. The Fifth Amendment's prohibition against double jeopardy was applied to the states in *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 707 (1969). The Court, in Waller, dismissed the "dual sovereignty" theory between city and state as an anachronism, finding the second trial by the State of Florida constituted double jeopardy in violation of the Fifth and Fourteenth Amendments to the Constitution, and the Court specifically held as follows:

"We decide only that the Florida courts were in error to the extent of holding that—

'... even if a person had been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.'"

The Court rejected Florida's contention that the "dual sovereignty" theory outlined in *Bartkus v. Illinois*, 359 U.S. 121 (1959), and *Abbate v. United States*, 359 U.S. 187 (1959), which permits successive prosecutions by federal and state governments for the same offence, controlled in this case, the Court further stated:

"[T]he judicial power to try petitioner on the first charges in municipal court springs from the same

organic law which created the state court of general jurisdiction in which petitioner was tried and convicted for a felony. Accordingly, the apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States. The legal consequence of that relationship was settled in *Grafton v. United States*, 206 U.S. 333 (1907), where this Court held that a prosecution by a court of the United States is a bar to a subsequent prosecution by a territorial court, since both are arms of the same sovereign."

After a review of *Waller*, Judge Wilson, in his Memorandum Opinion (App. p. 67), draws the issue as follows:

"The relevant factual situation in the instant case and in *Waller* are substantially identical. The only legal problem presented is whether the holding in *Waller* should be applied retroactively. The petitioner contends that it should and in support of his legal position relies upon certain footnotes in *Waller v. Florida*, *supra*, and in *Ashe v. Swenson*, \_\_\_ U.S. \_\_\_, \_\_\_ L. Ed. 2d \_\_\_ (1970). The respondent on the other hand relies upon the criteria outlined in *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199, and *Desist v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_ S. Ct. \_\_\_, 22 L. Ed. 2d 248 (1969), and contends that in accordance with these criteria the decision in *Waller* should be applied prospectively only."

On the issue herein involved as to whether *Waller* should be applied retroactively or prospectively, the respondent has in the lower courts dwelled at length on the reliance upon the dual sovereignty theory between the municipalities and the State of Tennessee. Therefore, it would seem appropriate at this point to examine this contention.

The municipality of the City of Chattanooga is a subdivision of the State of Tennessee and not a separate sovereign. Therefore, prosecution by the City of Chattanooga should be regarded as prosecution by the state, for purposes of applying the double jeopardy provision.

A municipality, in this instance the City of Chattanooga, is not a "sovereign"; it is a mere subdivision of the state. Article 11, Section 8, of the Tennessee Constitution gives power to the State Legislature (General Assembly):

"[To] Provide by general laws for the organization of all corporations hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested."

Municipal corporations in Tennessee may be created by the Legislature by special acts under and since the Constitution of 1870. *Luehrman v. Shelby County Taxing District* (1879), 70 Tenn. 425. Municipal corporations may be created by special laws, and their charters may be amended or repealed by special laws. *Luehrman v. Shelby County Taxing District, supra*.

The Supreme Court of the State of Tennessee held in *State ex rel. v. Wilson* (1883), 80 Tenn. 247, that the Legislature has the power to create municipal corporations independently of any constitutional grant.

It is within the legislative power to create a municipal corporation. *Bradley v. Rock Gardens Utility District* (1948), 186 Tenn. 665, 212 S.W.2d 657.

The City of Chattanooga is a municipal corporation granted a charter from the Tennessee State General Assembly by private act and throughout the years the charter has been amended, altered and expanded by



subsequent private acts. *The Code of the City of Chattanooga, Tennessee* (1960), Michie City Publications Company, Charlottesville, Virginia, 1961. The City Court of Chattanooga, Tennessee, was likewise established by private act from the Tennessee State Legislature.

A municipal corporation is a subordinate branch of the domestic government of a state. *Mayor and Recorder of City of Nashville v. Ray* (1873), 86 U.S. 468.

"Municipalities" are arms of state, governmental agencies on which state may confer governmental functions, to such extent and with such restrictions as may seem to legislature demanded by their corporate needs. *Nashville, C. & St. Louis Railway v. Marshall County* (1930), 161 Tenn. 236, 30 S.W.2d 268. Municipalities are creatures of legislature. *State ex rel. Town of Arlington v. Shelby County Election Commission* (1961), 209 Tenn. 289, 352 S.W.2d 809. The legislature has authority to create municipal corporations and vest them with such authority as does not violate federal or state constitutions. *Holly v. City of Elizabethton* (1951), 193 Tenn. 46, 241 S.W.2d 1001.

Under Tennessee law, the state has absolute control and complete sovereignty over municipalities. *City of Knoxville, Tennessee v. Bailey* (1955), 222 F.2d 520. Municipal corporations are arms of the state, to which has been delegated for purposes of local government a portion of the state's sovereign power. *Bricker v. Sims* (1953), 195 Tenn. 361, 259 S.W.2d 661. Municipal governments are instrumentalities of the state for purposes of local government, and the legislature has absolute control within constitutional limits of the creation, modification and abolition of municipal governments. *City of Elizabethton v. Carter County* (1958), 204 Tenn. 452, 321 S.W.2d 822.

A "municipal corporation" is a political or governmental agency of the state, which has been constituted for the local government of the territorial division described and which exercised, by delegation, a portion of sovereign power for the public good. Legislature has complete and unrestricted control of municipal corporations in state. *Thornton v. Carrier* (1957), 43 Tenn. App. 615, 311 S.W.2d 208.

From the above authorities it is clear that a municipality of the State of Tennessee is a creature of the state and the municipal courts exercise a portion of the judicial power of the state as conferred upon them by the State Legislature. The point was expressed in the context of Legislative Reapportionment in the following language:

Political subdivisions of states—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. . . . The relationship of the states to the federal government could hardly be less analogous.

*Reynolds v. Sims*, 377 U.S. 533, at 575 (1964), 84 S. Ct. 1362, at 1388; *Waller v. Florida*, *supra*.

Therefore, it appears abundantly clear the municipalities of Tennessee are not, and have not been recognized as "sovereigns" and the assertion of reliance on "dual sovereignty" as asserted by the respondent is without basis.

Any discussion of the legal question of the retroactive application of a decision must begin with the 1965 decision of *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731. That landmark decision established that in resolv-

ing a retroactivity issue the Court must consider three criteria:

- (1) the purpose of the new rule;
- (2) the reliance on the old rule by law enforcement officials;
- (3) the effect on the administration of justice of a retroactive application of the new rule.

Since 1965, the Supreme Court has been confronted with the retroactive application of a new standard on several occasions. It has held the new standards to be retroactive in the following cases: *Loper v. Beto*, 92 S. Ct. 1014, construing *Gideon v. Wainwright*, 83 S. Ct. 792, 372 U.S. 335 (right to counsel at trial); *Roberts v. Russell*, 88 S. Ct. 1921, 392 U.S. 293 (admission of a co-defendant's confession implicating defendant at a joint trial wherein a co-defendant does not take stand denies defendant right of confrontation); *McConnell v. Rhay*, 89 S. Ct. 32, 393 U.S. 4 (revocations of probation and impositions of sentences in proceedings at which defendants were not represented by counsel or advised of right to have counsel appointed were invalid); *Arsenault v. Massachusetts*, 89 S. Ct. 35, 393 U.S. 6 (guilty plea without counsel at preliminary hearing introduced at trial); *Berger v. California*, 89 S. Ct. 540, 393 U.S. 314 (testimony of missing witness who testified at preliminary hearing violated right of confrontation); *United States v. United States Coin and Currency*, 91 S. Ct. 1041 (gamblers had Fifth Amendment right to remain silent despite statutory requirement that they submit reports which could incriminate them in forfeiture proceeding); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (right to counsel on appeal); *Eskridge v. Washington Prison Board*, 357 U.S. 214 (right to transcript on appeal); *Ashe*

*v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189; *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (application of the Double Jeopardy Clause of the Fifth Amendment to the States); *Witherspoon v. Illinois*, 391 U.S. 510 (death penalty).

Likewise, the Supreme Court has held decisions to have prospective rather than retrospective application in several cases: *Linkletter v. Walker*, 85 S. Ct. 1731, 381 U.S. 618 (rule of *Mapp v. Ohio* that exclusion of evidence seized in violation of the search and seizure provisions of the Fourth Amendment is required of the states by the due process clause of the Fourteenth Amendment); *Tehan v. United States*, 86 S. Ct. 459, 382 U.S. 406 (adverse comment by a prosecutor or trial judge upon a defendant's failure to testify in a state criminal trial violates the federal privilege against compulsory self-incrimination); *Johnson v. State of New Jersey*, 86 S. Ct. 1772, 384 U.S. 719 (Escobedo decision which renders inadmissible statements elicited by police during an in-custody interrogation if accused's request to consult with his lawyer has been denied and he has not been effectively warned of his absolute constitutional right to remain silent and the Miranda decision relating to right of a suspect to have an attorney present at in-custody interrogation); *Stovall v. Denno*, 87 S. Ct. 1967, 388 U.S. 293 (rules requiring exclusion of identification evidence which is tainted by exhibiting accused for identifying witnesses before trial in absence of his counsel); *DeStefano v. Woods*, 88 S. Ct. 2093, 392 U.S. 631 (right to jury trial); *Fuller v. Alaska*, 393 U.S. 80, 89 S. Ct. 61 (construing *Katz v. United States*, which held that evidence obtained in violation of Federal Communications Act proscribing unauthorized interception and divergence of communications is not admissible in state

court trials); *Desist v. United States*, 89 S. Ct. 1030, 394 U.S. 244 (decision overruling cases holding that search and seizure of speech requires some trespass or actual penetration of a particular enclosure); *Jenkins v. Delaware*, 89 S. Ct. 1677, 395 U.S. 213 (Miranda case standards relating to rights of accused to remain silent and to assistance of counsel did not apply to retrial of defendant whose first trial commenced prior to date of Miranda decision); *Hill v. California*, 91 S. Ct. 1106, *Williams v. United States*, 91 S. Ct. 1148, *Elkanich v. United States*, 91 S. Ct. 1148 (search permissible in scope under pre-Chimel standards would not be retrospectively invalidated); *Mackey v. United States*, 91 S. Ct. 1160 (Marchetti and Gross doctrines not applied retroactively to overturn earlier income tax evasion conviction based on then applicable constitutional principles); *Adams v. Illinois*, 92 S. Ct. 916 (preliminary hearing is critical stage of criminal proceeding, required presence of counsel).

In *Williams v. United States*, *supra*, Mr. Justice White stated the following:

Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results

but to serve other ends. In these situations the new doctrine raises no question about the guilt of defendants convicted in prior trials.

In embarking upon this analysis of retrospective versus prospective effect of an overruling decision certain general principles have been clearly defined by the Supreme Court. The latest detailed pronouncement of these principles is to be found in *Desist v. United States*, 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969), wherein Justice Stewart observed:

Ever since *Linkletter v. Walker*, 381 U.S. 618, 629, 14 L. Ed. 2d 601, 608, 85 S. Ct. 1731, established that "the Constitution neither prohibits nor requires retrospective effect" for decisions expounding new constitutional rules affecting criminal trials, the Court has viewed the retroactivity or nonretroactivity of such decisions as a function of three considerations. As we most recently summarized them in *Stovall v. Denno*, 388 U.S. 293, 297, 18 L. Ed. 2d 1199, 1203, 87 S. Ct. 1967, "the criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Accordingly, "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective." See *Linkletter v. Walker*, *supra*.

Applying the criteria outlined in the *Linkletter Case* to the instant case, the Court must look to the history and purpose of the *Waller* rule; any reliance placed by the States upon the rule of law as it existed prior to *Waller*; and the effect on the administration of justice of a retrospective application of *Waller*.

## I.

**THE PURPOSE TO BE SERVED  
BY THE NEW RULE.**

In this regard the Court in *Desist v. United States, supra*, further outlines the relative importance of each criteria in weighing the relative merits of retroactivity.

Foremost among these factors is the purpose to be served by the new constitutional rule . . . . It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity.

The first appropriate inquiry to be undertaken is an examination of the history and purpose of the *Waller* rule. In this regard, the specific holding of *Waller v. Florida, supra*, is as follows:

We decide only that the Florida courts were in error to the extent of holding that—

“ . . . even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.”

The decision in the *Waller Case*, holding that a municipal court conviction and a state court conviction of the same offense constitutes double jeopardy and is in violation of the Fifth and Fourteenth Amendments, is in turn based upon the prior decision of the Supreme Court in the case of *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), wherein the Court overruled *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, and held that the Fifth Amendment prohibition against double jeopardy was made applicable to the states through the Fourteenth Amendment.

In *Benton v. Maryland*, *supra*, the Court held the double jeopardy provisions of the Fifth Amendment of the United States Constitution applicable to the states through the Fourteenth Amendment. This case involved a second prosecution by the State of Maryland for larceny after the defendant, Benton, had been acquitted on a first trial. In the first trial the defendant was convicted of burglary and acquitted of larceny. He appealed and the case was remanded to the trial court by the Appellate Court of Maryland for re-indictment and a new trial. On the retrial the defendant was convicted of both burglary and larceny. The defendant appealed and his conviction in the second trial for larceny was affirmed. On appeal to the Supreme Court of the United States, Justice Marshall delivering the opinion of the Court held that the Fifth Amendment guarantee against double jeopardy is enforceable against the states through the Fourteenth Amendment.

In *Benton v. Maryland*, *supra*, the Court stated:

... [W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled.

In examining the purpose of the *Waller Case* it is well to note the rationale, history and purpose of *Benton v. Maryland* as outlined by Justice Marshall:

The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. See *Bartkus v. Illinois*, 359 U.S. 121, 151-155, 3 L. Ed. 2d 684,



705-707, 79 S. Ct. 676 (1959, Black, J., dissenting). As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. "[T]he plea of autrefois acquit, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court put it in *Green v. United States*, 355 U.S. 184, 187-188, 2 L. Ed. 2d 199, 204, 78 S. Ct. 221, 61 A.L.R. 2d 1119 (1957), "[T]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of justice." The validity of petitioner's larceny conviction must be judged not by the watered-down standard enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment double jeopardy provision.

*Waller v. Florida* is simply an expansion of the newly announced principles in *Benton v. Maryland*. In abrogating the "dual sovereignty" theory with regard to municipal and state charges based upon the identical offense,

the Court relied upon the holding in *Benton* for the proposition that the Fifth Amendment prohibition against double jeopardy applied to the states. While recognizing that successive prosecutions by state and federal governments had been held to be non-violative of the Double Jeopardy Clause since dual sovereignties are involved [see *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213 (1847); *Bartkus v. Illinois*, 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1969); *Abbate v. United States*, 359 U.S. 187, 3 L. Ed. 2d 729, 79 S. Ct. 666 (1969)], the Court held these cases inapplicable in a situation where the successive prosecutions were by municipal and state governments, both arms of the same sovereignty. Rather, in *Waller* the Court followed the rule previously established in the case of *Grafton v. United States*, 206 U.S. 333, 51 L. Ed. 1084, 27 S. Ct. 749 (1907), wherein it had been held that "a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court (Philippine Islands), since both are arms of the same sovereignty."

Having pointed out the reliance placed in *Waller* upon the prior decisions of *Benton v. Maryland*, *supra*, and *Grafton v. United States*, *supra*, two observations are appropriate.

One observation is that the retroactivity of the *Benton* decision has been decided and that case has been held to be "fully retroactive."

In a concurring opinion, in *Waller v. Florida*, *supra*, Justice Brennan, at page 1189, in an asterisk footnote, states:

\* I adhere to the Court's holding in *Ashe v. Swenson*, 396 U.S., at \_\_\_, 90 S. Ct. at 1189, 24 L. Ed. 2d at \_\_\_, n. 1, that our decision in *Benton v.*

Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L. Ed. 2d 707 (1969), holding the Double Jeopardy Clause of the Fifth Amendment applicable to the States, is "fully 'retroactive'." See also *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2089, 23 L. Ed. 2d 656 (1969).

In *Ashe v. Swenson*, 90 S.Ct. 1189 (April 6, 1970), Justice Stewart, delivering the opinion of the Court, states in Footnote 1, at page 1191:

1. There can be no doubt of the "retroactivity" of the Court's decision in *Benton v. Maryland*. In *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L. Ed. 2d 656, decided the same day as *Benton*, the Court unanimously accorded fully "retroactive" effect to the *Benton* doctrine.

Further, three circuits have considered the issue and have held *Benton* to be fully retroactive. See *Mulreed v. Kropp*, 425 F.2d 1095 (C.A. 6, 1970); *Booker v. Phillips*, 428 F.2d 420 (C.A. 4, 1970); and *Galloway v. Beto*, 421 F.2d 284 (C.A. 5, 1970). In the *Mulreed Case*, *supra*, the Sixth Circuit reasoned the issue of retroactivity as follows:

We think this case (*Benton*) goes beyond the concededly important consideration of the integrity of the truth determining process; it goes to the very quick of a very long and cherished heritage in the administration of criminal justice, namely the sometimes extended deprivation of liberty as the price for demanding successfully a trial process free of constitutional infirmity. Therefore we conclude that *Benton* applies retroactively and is controlling here.

Although the retroactivity of the *Benton* decision is not necessarily determinative of the issue presented in the present case, that is, whether *Waller v. Florida* should be

accorded retroactive effect, it is obvious that the reasoning which accords retroactivity to *Benton* must be given weighty consideration in determining the retroactivity of *Waller v. Florida*.

A second observation appropriate at this point is that *Waller v. Florida* overrules no previous federal judicial precedent. Rather, it relies upon a reassertion of the principles laid down in the 1907 decision of *Grafton v. United States*, 206 U.S. 333, 51 L. Ed. 1084, 27 S. Ct. 749. Accordingly, the *Waller* decision establishes no new federal constitutional interpretation except to the extent that it may overrule some local or state court decision to the contrary.

When the foregoing two observations are jointly considered, they appear to be tantamount to a prior adjudication upon the issue now before the Court and to require that *Waller v. Florida* be given fully retroactive effect. To the extent that the *Waller* decision asserts the double jeopardy rule of *Benton v. Maryland*, the issue of retroactivity has been adjudicated. To the extent that the *Waller* decision asserts the rule of *Grafton v. United States* to deny any dual sovereignty between a state and its municipalities, no new federal constitutional law is established and no former federal precedent is overruled.

It is important to note that the Fifth Amendment rights recognized in *Waller* is not concerned with merely an evidentiary privilege. *Waller* constituted a recognition that municipal and state courts cannot try a defendant twice on charges based on the same facts. This case places an effective limitation upon the government itself. It is a recognition that the methodology utilized in the State of Tennessee is not consonant with the rights guaranteed by the Fifth Amendment. It follows inevitably that many of

those convicted in this state were convicted in derogation of their Fifth Amendment rights. Denial of these rights in the past went to the heart of the prosecution. Recognition of these rights constitutes a complete and effective bar to the governmental proceedings directed towards punishment of the exercise of the Fifth Amendment rights. Recognition of the retroactivity of *Waller* will permit at least a partial purging from our history and our jurisprudence of convictions obtained by a process repugnant to our Constitution.

A consideration of the two remaining criteria for determining the issue of retroactivity, that is, the reliance placed by law enforcement officials upon a contrary rule and the effect on the administration of justice of a retroactive application, would appear to be precluded under the foregoing discussion of Supreme Court decisions, for their analysis is appropriate only where retroactivity remains in question after a consideration of the initial criteria.

## II.

### THE RELIANCE PLACED ON THE OLD RULE BY LAW ENFORCEMENT OFFICIALS.

It may be noted in this regard that Chief Justice Burger in a footnote to his opinion in the *Waller Case* (see footnote # 3) lists 21 states which currently treat municipalities and the state as separate sovereigns for double jeopardy purposes. Obviously the State of Florida may be added to this list; so, too, may the State of Tennessee. See *Mullins v. State*, 214 Tenn. 366, 380 S.W.2d 201 (1964); *Greenwood v. State*, 65 Tenn. 557 (1873). While in a very real sense these state decisions are overruled by the *Waller Case*, the states cannot be said in any sense to

have relied upon a federal precedent in establishing their rule, as the federal precedent of *Grafton v. United States, supra*, was to the contrary, as pointed out in the *Waller* decision.

In *Grafton v. United States, supra*, the defendant, a Private in the Army of the United States, was tried and acquitted by a military court-martial of the offense of second degree murder while on duty in the Philippine Islands. Following his acquittal, the accused was indicted for murder under the Philippine Penal Code for the same offense. The defendant was found guilty after his plea of double jeopardy had been overruled.

The Supreme Court reversed the conviction and Justice Harlan delivered the opinion:

It must, then, be taken on the present record that an affirmance of the judgment of the civil court will subject the accused to punishment for the same acts, constituting the same offense as that of which he had been previously acquitted by a military court having complete jurisdiction to try and punish him for such offense. It is attempted to meet this view by the suggestion that Grafton committed two distinct offenses—one against military law and discipline, the other against the civil law which may prescribe the punishment for crimes against organized society by whomsoever those crimes are committed—and that a trial for either offense, whatever its result, whether acquittal or conviction, and even if the first trial was in a court of competent jurisdiction, is no bar to a trial in another court of the same government for the other offense. We cannot assent to this view. It is, we think, inconsistent with the principle, already announced, that a general court-martial has, under existing statutes, in time of peace, jurisdiction to try an officer or

soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public. The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently, a civil court proceeding under the authority of the United States cannot withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. A different interpretation finds no sanction in the Articles of War; for the 102A Article of War (which is the same as Article 87, adopted in 1806, 2 Stat. 369) declares that "no person"—referring, we take it, to persons in the Army—"shall be tried a second time for the same offense." But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government.

Therefore, the United States Supreme Court, as early as 1907, laid down the principle involved in the case at bar and *Waller* concerning "dual sovereignty." Yet, the City Court of Chattanooga, Tennessee, has flagrantly ignored this ruling because of its practice of raising revenue by fining defendants on violations of City Ordinances which are in fact either identical or lesser included offenses of state charges.

It is the position of the petitioner that such action constitutes such a deliberate violation of his rights under the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment that the interests of justice demand a retroactive application of *Waller*.

The petitioner also contends that the State's reliance on *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149 (1937), is misplaced as an attempt to establish a precedent to justify the denial of a retroactive holding in *Waller*.

It first must be established that the issues involved in *Waller* are completely distinguishable from *Palko*.

In *Palko*, the defendant was convicted of second degree murder and sentenced to life imprisonment. On appeal, the conviction was overturned and the defendant granted a new trial. A plea of double jeopardy was overruled and the defendant was convicted of first degree murder. The Court affirmed the conviction and Justice Cardozo rendered the opinion:

Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political



institutions"? *Hebert v. Louisiana*, *supra*. The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State v. Felch*, 92 Vt. 477, 105 A. 23; *State v. Lee*, *supra*. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge (*State v. Carabetta*, 106 Conn. 114, 137 A. 394), has not been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

Under recent holdings of the Supreme Court, the conviction of *Palko* on a first degree murder charge after being originally convicted of second degree murder would have to be set aside, but that is not the issue involved in the present case.

It is the petitioner's contention that the conduct of the City of Chattanooga, Tennessee, in violating his Fifth Amendment rights for the purpose of raising revenue does "violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," discussed by Justice Cardozo.

## III.

THE EFFECT ON THE ADMINISTRATION  
OF JUSTICE.

The respondent has submitted certain data regarding the impact on the administration of justice, consisting of responses received from law enforcement authorities in the various jurisdictions previously following the dual sovereignty rule. It may be noted that the responding officials from ten states previously following the dual sovereignty rule expressed the opinion that the *Waller* decision would have little or no effect on the administration of justice in their state (Alabama (App. p. 28), Illinois (App. p. 30), Idaho (App. p. 35), Mississippi (App. p. 39), Missouri (App. p. 41), Nevada (App. p. 44), Nebraska (App. p. 43), Oregon (App. p. 54), Wisconsin (App. p. 63), and Wyoming (App. p. 68). Four expressed the opinion that sufficient data was not available to make an evaluation (Colorado (App. p. 32), Minnesota (App. p. 00), North Dakota (App. p. 50), and Oklahoma (App. p. 52). And no response was received from seven states (Alaska, Iowa, Kansas, Louisiana, Ohio, South Dakota, and Florida). Only the responses from two states (Tennessee (App. p. 21) and Washington (App. p. 61)) expressed the opinion that there would be a substantial effect on the administration of justice by a retroactive application of the *Waller* decision. Except upon the local level within this jurisdiction, the data submitted does not appear to satisfactorily establish a preference against retroactivity.

The petitioner feels that an in-depth analysis of the responses should be discussed in order to determine whether a retroactive holding of *Waller* in the case at bar would be significant.

In *Tehan v. United States*, 86 S. Ct. 459, 382 U.S. 406 (1966), Mr. Justice Stewart discussed "the effect on the administration of justice of a retrospective application of *Mapp v. Ohio*."

The last important factor considered by the Court in *Linkletter* was "the effect on the administration of justice of a retrospective application of *Mapp*." 381 U.S., at 636, 85 S. Ct. at 1741. A retrospective application of *Griffin v. California* would create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retrospective application of *Mapp*. A retrospective application of *Mapp* would have had an impact only in those States which had not themselves adopted the exclusionary rule, apparently some 24 in number. A retrospective application of *Griffin* would have an impact only upon those States which have not themselves adopted the no-comment rule, apparently six in number. But upon those six States the impact would be very grave indeed. It is not in every criminal trial that tangible evidence of a kind that might raise *Mapp* issues is offered. But it may fairly be assumed that there has been comment in every single trial in the courts of California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio, in which the defendant did not take the witness stand—in accordance with state law and with the United States Constitution as explicitly interpreted by this Court for 57 years.

Empirical statistics are not available, but experience suggests that California is not indulging in hyperbole when in its *amicus curiae* brief in this case it tells us that "Prior to this Court's decision in *Griffin*, literally thousands of cases were tried in California in which comment was made upon the failure of the accused to take the stand. Those

reaping the greatest benefit from a rule compelling retroactive application of Griffin would be [those] under lengthy sentences imposed many years before Griffin. Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available." There is nothing to suggest that what would be true in California would not also be true in Connecticut, Iowa, New Jersey, New Mexico, and Ohio. To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.

In *Williams v. United States*, *supra*, Mr. Justice Brennan, in a concurring opinion overruling retroactive application of *Chimel v. California*, 89 S. Ct. 2034, 395 U.S. 752, stated:

Persons convicted through the use of evidence inadmissible under *Chimel* have been found to have engaged in conduct which the government involved may legitimately punish. *Chimel* casts no doubt upon the propriety of the government's interest in punishing those who have engaged in such conduct. Accordingly, it may fairly be assumed that retroactive application of its standards would result in a substantial number of retrials. Yet *Chimel* likewise casts no doubt upon the reliability of the initial determination of guilt at the previous trial. Moreover, the legitimate reliance of law-enforcement officials on *Harris* and *Rabinowitz*, as already noted, may well have led them to conduct a warrantless search merely because the warrant requirement, although easily satisfied, was understandably not understood. The consequence of this is that retroactive application of the standards applied in *Chimel*

would impose a substantial burden upon the federal and state judicial systems, while serving neither to redress knowing violations of individual privacy nor to protect a class of persons the government has no legitimate interest in punishing.

In *Linkletter v. Walker, supra*, Mr. Justice Clark stated:

Finally there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

The responses from the two states, Tennessee and Washington, which feel that a retroactive holding of *Waller* would have an adverse effect on the administration of justice must be closely analyzed.

In the affidavit of Phil M. Canale, Jr., District Attorney General of Shelby County, Tennessee (App. p. 22) and his letter to Edward E. Davis, District Attorney General of Hamilton County, Tennessee (App. p. 24), there are some rather revealing statements:

We have found that there would be a minimal effect on felonies which were pending both prior to *Waller v. Florida* and presently pending if *Waller v. Florida* were declared to be retroactive. This minimal effect is due to the established way in which the bind-over hearings were held in the City Court in this jurisdiction . . . .

However, with respect to misdemeanors that are presently pending, we feel that approximately 15% of the present misdemeanors in Shelby County would have to be dismissed if *Waller v. Florida* was declared to be retroactive . . . . (October 30, 1970. (App. p. 22)

The letter of November 17, 1970, from District Attorney Canale is certainly vague and based on speculation. Out of 840 records of inmates requested to be checked for possible *Waller* effect, only 42 were actually checked. Of these only two (2) could have been adversely affected by a retroactive holding of *Waller*. His guess of forty (40) serious felonies affected by a retroactive holding is certainly only an approximation and is not absolutely accurate. The following statement is also significant:

We have been fortunate in this jurisdiction in the manner in which these cases have been handled in City Court as far as the lack of placing city charges on these serious felony charges. (App. p. 25)

The affidavit of Edward E. Davis, District Attorney General from Hamilton County, Tennessee, fails to distinguish between felonies and misdemeanors (App. p. 26). Since his affidavit was dated November 30, 1970, this is a highly important factor in determining the effect on the administration of justice.

Tennessee Code Annotated §39-105 states the prescribed penalty for misdemeanors in our state:

Every person who is convicted of a misdemeanor, the punishment for which is not otherwise prescribed by a statute of this state, shall be punished by imprisonment in the county jail or workhouse not more than one (1) year, or by fine not exceeding one thousand dollars (\$1,000.00), or by both, in the discretion of the court.

Therefore, any defendant being held on a misdemeanor charge in Tennessee would most likely have already been released from custody and therefore not affected by a retroactive holding.

Also significant is the fact that Tennessee is a state which has an Indeterminate Sentence Law which allows a prisoner to be eligible for parole at an earlier date than the number of years imposed by the court of jury.

The applicable statutes concerning sentencing are:

**40-3612. Eligibility for parole.**—Every person sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board. The time of his release shall be discretionary with the board, but no such person shall be released until he has served such minimum sentence nor until he shall have served one (1) year.

Every person sentenced to a determinate sentence and confined in a state prison, when he has served a period of time equal to one-half (1/2) of the sentence imposed by the court for the crime for which he was convicted, but in no event less than one (1) year, shall likewise be subject to parole in the same manner provided for those sentenced to an indeterminate sentence.

The action of the board in releasing prisoners shall be deemed a judicial function and shall not be reviewable if done according to law.

In addition thereto where eligibility for parole or discharge after all good conduct credits have been given, shall occur more than eighteen (18) months but not more than five (5) years from the date of

sentence, the board at its discretion may grant a probationary parole to such prisoner not more than six (6) months before the date of his eligibility for parole or discharge, and where such date of eligibility for parole or discharge shall occur more than five (5) years from the date of sentence, it may grant such probationary parole not more than one (1) year from the date of eligibility.

**40-3613. Power to parole.**—The board of probation and paroles shall have power to cause to be released on parole any person sentenced to confinement in the penitentiary who has served the minimum term provided by law for the offense committed by him, less good time; provided, that no convict serving a life sentence shall be paroled until he has served for twenty-five (25) years, less diminution which would have been allowed for good conduct had his sentence been for twenty-five (25) years; provided further, that no person convicted of a sex crime shall be paroled unless the department of mental health, after an examination of such person, certifies to the board of probation and paroles that he could be released with safety to the public.

Any person having been convicted and sentenced as an habitual criminal under §40-2806, may become eligible for parole provided such person shall have been confined or served a term in the state penitentiary of not less than thirty (30) full calendar years. The granting of such parole shall be within the discretion of the parole board. Provided further, any person who shall have been convicted and sentenced to a term of imprisonment in the state penitentiary for a period or term of fifty (50) years or more, may become eligible for parole provided such person shall have been confined or



served a term in the state penitentiary of not less than thirty (30) full calendar years. The granting of such a parole shall be within the discretion of the parole board. The provisions of this paragraph shall apply to any inmate of the penitentiary heretofore convicted and coming within the provisions of this paragraph.

Under the provisions of Tennessee Code Annotated §41-1219, a prisoner serving time for a misdemeanor can receive a reduction of one-fourth ( $1/4$ ) of his sentence on a misdemeanor charge for good behavior.

*41-1219. Sentence to hard labor.*—In all cases where a person is by law liable to be imprisoned in the county jail for punishment, or for failure to pay a fine and costs, or costs only, as the case may be, in misdemeanor cases, and in felony cases where the punishment has been commuted from confinement in the penitentiary to the county jail or workhouse, he shall be sentenced to be confined, and shall be confined, at hard labor in the county workhouse until the expiration of his sentence of imprisonment, and, thereafter, until the fine and costs, or costs only, as the case may be, have been worked out, paid, or secured to be paid. All such fines and costs shall be paid to the county trustee, upon receivable warrant of the judge or chairman of the court, when paid by the prisoner or his sureties.

Each such prisoner who shall have been sentenced to the county jail or workhouse for any period of time less than one (1) year on either a misdemeanor or a felony, and who shall demean himself uprightly, shall have deducted from the sentence imposed by the court time equal to one-quarter ( $1/4$ ) of the said sentence. Fractions of a day's credit for good time of one-half ( $1/2$ ) or more shall be considered as a full day's credit. Should any prisoner violate the

rules and regulations of the jail or workhouse, or otherwise demean himself improperly, the district attorney-general may file a petition with the clerk of the court which sentenced the prisoner and the trial judge shall set the cause for hearing within a reasonable time. Notice of such hearing shall be given to the prisoner and he shall be afforded the opportunity to be heard. After such hearing, the trial judge may revoke all or any part of the good time of such prisoner. The decision of the trial judge shall be final and no appeal may be taken from such decision. If the trial judge is not available for such hearing due to death, illness, recess, or any other cause, the hearing may be held by any other judge who has equal or concurrent jurisdiction with the trial judge. Provided, however, that the said one quarter (1/4) credit for good time shall not apply to prisoners after they have commenced to work out either fines or costs. Provided further, that upon passage this paragraph shall be retrospective in its application and shall apply to the entire sentence of those prisoners coming under the provisions of this paragraph who are confined to the county jail or workhouse on April 20, 1967.

Also, Tennessee criminal procedure allows a prisoner in the jail or workhouse on a misdemeanor conviction to petition the trial judge for a suspended sentence every thirty (30) days after the commencement of the execution of the judgment.

These statutes are cited by the petitioner to further show that it is very unlikely that there are prisoners in custody on misdemeanor charges who would be affected by a retroactive holding of *Waller*.

It is interesting to further note that Hamilton County appears to be the only jurisdiction that would be affected

in any way by a retroactive holding. No statistical data is presented by any of the other municipal courts in Tennessee's 95 counties alleging an adverse effect as a result of the petitioner's position being sustained.

As stated by the District Attorney from Memphis previously, very few felonies would be involved and it is highly doubtful that there are any prisoners now in custody on misdemeanor charges which were in effect in October, 1970.

Therefore, it is readily apparent that the City of Chattanooga, Tennessee, is the only jurisdiction that could possibly be adversely affected in this matter. The petitioner respectfully submits that the violation of his Fifth Amendment right against twice being placed in jeopardy far outweighs the interest of this single municipality to raise revenue. Until recently, it was also the practice in this state to require an individual to work out a fine and court costs. *Wilson v. Sloan*, 438 S.W.2d 75 (1968).

It would be an impossible task to determine just how many prisoners have had to remain in custody for a longer period of time than that imposed by the trial court in order to work out a fine and costs to raise revenue for the City of Chattanooga.

The inconsequential effect on the administration of justice caused by retroactivity of *Waller* is in sharp contrast to cases where retroactivity has been denied. In *Linkletter*, for example, the Court properly concluded that *Mapp's* retroactive application would have "tax[ed] the administration of justice to the utmost." *Linkletter v. Walker*, *supra* at 637. The *Mapp* rule, if retroactive, would have applied to evidence obtained by unreasonable search and seizure in any type of criminal case. Retrials

would have had to consider "the excludability of evidence long since destroyed, misplaced or deteriorated." *Linkletter v. Walker*, *supra* at 637. See also *Fuller v. Alaska*, *supra* at 81 (regarding evidence seized in violation of §605 of the Federal Communications Act, 47 U.S.C. §605). Also, retrials of cases long closed inevitably would be made exceedingly difficult because of "unavailability of witnesses and dim memories." *Stovall v. Denno*, *supra* at 300. These and similarly onerous burdens on the administration of justice were very persuasive in convincing the Court to deny retroactivity in *Stovall v. Denno*, *supra* at 300 (denying retroactivity to *Wade* and *Gilbert*), *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (denying retroactivity to *Escobedo* and *Miranda*) and *Tehan v. United States*, 382 U.S. 406, 418-19 (1966) (denying retroactivity to *Griffin v. California*).

The minimal effect of retroactively applying *Waller* is apparent from a comparison of its impact with the potential impact of the cases mentioned above. This minimal effect on the administration of justice is a persuasive reason in favor of applying *Waller* retroactively.

### ARGUMENT

The Court of Appeals for the Sixth Circuit was in error in reversing the trial court's finding that the holding in *Waller v. Florida* be granted retroactive application in the case at bar.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below be reinstated and that the judgment of the Court of Appeals for the Sixth Circuit be vacated and the petitioner be discharged from custody.

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### CERTIFICATE

We hereby certify that a copy of the foregoing Brief of Petitioner to the United States Supreme Court has been served by United States Mail, postpaid, this 28th day of June, 1972, upon David Pack, Attorney for Respondent.

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Jerry H. Summers

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James D. Robinson

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1972

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No. 71-6272

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SAMUEL ED ROBINSON,  
Petitioner,

v.

WILLIAM S. NEIL, Warden, Tennessee  
State Penitentiary,  
Respondent.

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On Writ of Certiorari to the United States Court of Appeals  
for the Sixth Circuit

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**BRIEF FOR THE RESPONDENT**

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**QUESTION PRESENTED**

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The sole question presented on this appeal is:

Whether **Waller v. Florida**, 397 U.S. 387 (1970), abrogating the "dual sovereignty" doctrine with respect to criminal prosecutions by the States, should be applied retroactively.

### STATEMENT OF THE CASE

The facts in the present case are similar to the facts in **Waller v. Florida**, 397 U.S. 387 (1970). In 1962, Robinson was tried and convicted in the Chattanooga, Tennessee municipal court of three assault and battery offenses in violation of a municipal ordinance. He was fined \$50.00 and costs for each offense.

Subsequently, he was named in three indictments charging assault with intent to commit first degree murder arising out of the same facts on which the municipal convictions had been based. Following arraignment in the state court of general jurisdiction, he entered a plea of guilty to each charge and received two consecutive sentences of two to ten years and one consecutive sentence of three to five years. He is presently confined in the Tennessee State Penitentiary at Nashville.

In July, 1966, Robinson filed a petition for a writ of habeas corpus in the Criminal Court of Davidson County, Tennessee, contending that the state court convictions violated the Double Jeopardy Clause of the Fifth Amendment in that they stemmed from the same facts as the municipal court convictions. The Tennessee state court denied the petition. The Tennessee Supreme Court affirmed.

Robinson filed a petition for habeas corpus relief in the United States District Court in March, 1967, again advancing the double jeopardy argument. That court denied the petition on the ground that under **Palko v. Connecticut**, 302 U.S. 319 (1937), the Double Jeopardy Clause of the Fifth Amendment was not applicable to the States through the Fourteenth Amendment. **Robinson v. Henderson**, 268 F.Supp. 439 (E.D. Tenn. 1967), *aff'd* 391 F.2d 933 (6th Cir. 1968).

Soon thereafter, **Palko v. Connecticut**, *supra*, was overruled by **Benton v. Maryland**, 395 U.S. 784 (1969), which held that the Fifth Amendment double jeopardy provision was applicable to the States. Following **Benton v. Maryland**, the court decided **Waller v. Florida**, 397 U.S. 387 (1970), which abrogated the "dual sovereignty" doctrine with respect to States and municipalities. Robinson filed a new habeas corpus petition in federal court. The District Court, holding **Waller** should be applied retroactively, granted Robinson habeas corpus relief. **Robinson v. Neil**, 320 F.Supp. 894 (E.D. Tenn. 1971). This was reversed by the United States Court of Appeals for the Sixth Circuit. **Robinson v. Neil**, 452 F.2d 370 (6th Cir. 1971).

### SUMMARY OF ARGUMENT

This Court's approach to giving new constitutional standards retroactive effect has undergone several changes since first articulated in **Linkletter v. Walker**, 381 U.S. 618 (1965). The three traditional elements of **Linkletter** are still applied, but since **Desist v. United States**, 394 U.S. 244 (1969), the Court has consistently maintained that it is the purpose of the new constitutional rule which determines its retroactivity. When the purpose of the new rule is to eliminate elements in the trial which substantially impair its truth-finding function, the Court has given the new standard retroactive effect. **Williams v. United States**, 401 U.S. 646 (1971).

In addition to the "determination of purpose" approach, this Court has also held that the effect of a new constitutional rule, if found to be basically prospective in nature, will only extend to cover those acts occurring after the announcement of the new rule. **Desist v. United States**, 394 U.S. 244 (1969).

**Waller v. Florida**, 397 U.S. 387 (1970), closely resembles those decisions which have not been accorded retroactive

effect. **Adams v. Illinois**, 405 U.S. 278 (1972); **Williams v. United States**, 401 U.S. 646 (1971); and **DeStephano v. Woods**, 392 U.S. 631 (1968). While these decisions deal with rights that have been labeled "fundamental," the Court determined these new rules were not designed to protect the reliability of the fact-finding process.

The purpose of **Waller** was to eliminate the "Dual Sovereignty" doctrine. This diminishes the possibility of prosecutorial misconduct and judicial harassment by limiting the State's opportunity to prosecute an individual. **Waller** did not say that the result of the second state prosecution was invalid; it merely said that the institution of the second action was improper. Thus **Waller** did not deal with the integrity of the fact-finding process, rather, it compelled the States to abandon the long-tolerated practice of successive prosecutions.

When the purpose of the new rule does not absolutely demand retroactivity, this Court has also considered the possible effect of the new rule on the administration of justice as well as the extent of reliance on the old constitutional rule. There is ample evidence that many States had permitted multiple prosecutions by municipalities and the State at the time **Waller** was decided. Justice does not presently demand that this Court rule the States should have been able to anticipate **Waller**. Further, there are a sufficient number of jurisdictions which would be substantially affected by any retroactive application of **Waller** to justify giving the **Waller** rule prospective effect only. See generally, **Tehan v. United States ex rel. Shott**, 382 U.S. 406, 417-418 (1966) (where nonretroactivity was favored even though only six states were involved and data was not available to determine the actual number of cases within those six states).

Finally, this Court should recognize and follow its long-standing policy of declining to overturn convictions need-

lessly. **Jenkins v. Delaware**, 395 U.S. 213 (1969). Nowhere does petitioner allege his conviction was obtained by a procedure which did not comply with then-recognized constitutional standards. Nowhere does the petitioner protest his innocence; in fact, Robinson entered a plea of guilty in the state proceeding. This, coupled with the fact that the purpose of the **Waller** rule does not demand retroactive application, is sufficient ground for this Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

## ARGUMENT

### I. Successive Prosecutions in State Criminal Proceedings Permitted by the "Dual Sovereignty" Doctrine Did Not Affect the Reliability of the Fact-Finding Process of the Second Trial.

#### A. The judicial development of retroactivity guidelines.

The present standard for determining whether new constitutional rules of criminal procedure should be accorded retroactivity invokes a consideration of three factors; first, the purpose of the new constitutional rule; second, the extent of reliance on the old constitutional rule; and finally, the impact on the administration of justice of the new rule's retroactive application. **Linkletter v. Walker**, 381 U.S. 618, 636 (1965). **Linkletter** held the rule announced in **Mapp v. Ohio**, 367 U.S. 643 (1961), should not be applied retroactively to those convictions that had become final before the date of the **Mapp** decision. In this Court's discussion of the retroactivity issue, Mr. Justice Clark stated:

"In short, we must look to the purpose of the **Mapp** rule; the reliance placed upon the **Wolf** doctrine; and the effect on the administration of justice of a retroactive application of **Mapp**."

**Linkletter v. Walker**, *supra*, 381 U.S. at 636.

This Court has consistently utilized the standard announced in **Linkletter** for determining the retroactivity of new constitutional rules of criminal procedure. **Adams v. Illinois**, 405 U.S. 278 (1972); **Desist v. United States**, 394 U.S. 244 (1969); **DeStefano v. Woods**, 392 U.S. 631 (1968); **Stovall v. Denno**, 388 U.S. 293 (1967); **Johnson v. New Jersey**, 384 U.S. 719 (1966); and **Tehan v. United States ex rel. Shott**, 382 U.S. 406 (1966).

Of the three elements in the *Linkletter* standard, the "purpose" element has become the controlling factor on the issue of retroactivity. In *Desist v. United States, supra*, the Court in analyzing the issue of retroactivity stated:

"Foremost among these factors is the purpose to be served by the new constitutional rule."

394 U.S. at 241.

The Court stated further:

"It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity."

394 U.S. at 251.

The guideline for determining when the purpose of a new constitutional rule conclusively favors retroactivity was announced in *Williams v. United States*, 401 U.S. 646 (1971). The Court stated that complete retroactivity would be accorded only when the purpose of the new constitutional rule was to eliminate an element in the criminal trial that "substantially impairs its truth-finding function." *Williams v. United States, supra*, 401 U.S. at 653.<sup>1</sup>

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<sup>1</sup> This guideline was also followed in *Adams v. Illinois*, 405 U.S. 278 (1972), holding *Coleman v. Alabama*, 399 U.S. 1 (1970), would not be applied retroactively; *Mackey v. United States*, 401 U.S. 667 (1971), holding *Marchetti v. United States*, 390 U.S. (1968) and *Grosso v. United States*, 390 U.S. 62 (1968), were not retroactive; *Hill v. California*, 401 U.S. 797 (1971), *Williams v. United States* and *Elkanich v. United States*, 401 U.S. 646 (1971) holding *Chimel v. California*, 395 U.S. 752 (1969) was not retroactive; and *Fuller v. Alaska*, 393 U.S. 80 (1968) holding *Lee v. Florida*, 392 U.S. 378 (1968) was not retroactive. These decisions stated that the new procedural standards being construed were not intended to remedy serious flaws in the fact-finding process.



The critical question is whether the purpose of the rule announced in **Waller** substantially eliminates prejudicial error in the fact-finding process.

B. To accord a new constitutional rule retroactivity, the purpose of the new rule should substantially affect the reliability of the fact-finding process.

It is misleading to suggest that any decision announcing a new constitutional rule of criminal procedure has only one purpose. However, **Waller v. Florida** suggests the major thrust of that decision was the abolition of the "Dual Sovereignty" doctrine in state criminal prosecutions.

In **Waller**, Mr. Chief Justice Burger recognized that the doctrine of "Dual Sovereignty", allowing a state and a municipality to impose separate punishments in separate prosecutions for the same offense, had been supported previously by the States' reliance on two earlier cases, **Bartkus v. Illinois**, 359 U.S. 121 (1959) and **Abbate v. United States**, 359 U.S. 187 (1959). **Bartkus** and **Abbate** upheld successive prosecutions for the same criminal offense by federal and state courts as instrumentalities of separate sovereigns. In **Waller**, however the Court stated that the States' reliance on **Bartkus** and **Abbate** as justifying successive prosecutions for the same offense by State and municipal courts was misplaced. A municipality should be considered not as a separate sovereign but rather as an instrumentality of the State. **Reynolds v. Sims**, 377 U.S. 533 (1966).

**Waller** considered the State-municipality relationship akin to the relationship between the United States and a territory of the United States. Since the Court had forbidden successive prosecutions by a federal court and a territorial court of the federal government as acts of the

same sovereign in *Grafton v. United States*, 206 U.S. 333 (1907), the Court by implication, could also prohibit similar acts by the States and their municipalities. *Waller v. Florida*, *supra*, 397 U.S. at 394, 395.

*Waller* abrogated the long-standing rule under which municipalities were considered separate sovereigns, capable of imposing separate criminal punishments. The effect of *Waller* is to prohibit future successive criminal prosecutions for the same offense by the States, thereby limiting the States to one forum. The purpose of *Waller* is to dismantle the "Dual Sovereignty" fiction which had supported subsequent state criminal prosecutions.

*Waller* was not intended to remove an element from the criminal trial that impaired the truth-finding process, and therefore should not be afforded retroactivity. A comparison of *Waller* with other cases in which this Court has accorded retroactivity to new constitutional rules reveals *Waller* is not the type of case which affects the fact-finding process. As the Court stated in *Waller*:

"We decide only that the Florida courts were in error to the extent of holding that, 'even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such a person in the proper state court'."

*Waller v. Florida*, *supra*, 397 U.S. at 395.

*Waller* intimates no inaccuracy in the verdict. In no manner does it imply that *Waller* did not receive a fair trial in the subsequent state prosecution. These two policy considerations found in other cases where retroactivity was granted do not appear in the instant case or in *Waller*.

The Court in *DeStephano v. Woods*, 392 U.S. 631 (1968), declined to grant retroactivity to *Duncan v. Louisiana*,

391 U.S. 145 (1968) and *Bloom v. Illinois*, 391 U.S. 194 (1968), holding that the fundamental right to a jury trial should be extended to the States. Retroactivity was denied because the absence of a jury did not create a serious flaw in the fact-finding process. The Court recognized that a retroactive extension of the right to a jury trial would greatly burden the administration of justice. The Court conceived the purpose of jury trials as generally tending to prevent arbitrariness and repression. *DeStephano v. Woods*, *supra*, 392 U.S. at 633.

*Benton v. Maryland*, 395 U.S. 784, 796 (1969), also equated the right to trial by jury with the prohibition against double jeopardy. The Court stated that the retroactivity of such fundamental rights must be determined using current standards. *Waller*, as a refinement of *Benton*, also states that the purpose of that decision is to prevent arbitrary and repressive acts by the State. Thus *Waller*, by analogy, should be accorded the same treatment as *DeStephano v. Woods*.

*C. Waller v. Florida* and *Ashe v. Swenson* represent two different aspects of the Double Jeopardy Clause of the Fifth Amendment.

Since *Linkletter*, only one decision involving double jeopardy, *Benton v. Maryland*, 395 U.S. 784 (1969), has been given full retroactivity. *Benton* bars a second prosecution for the same offense after acquittal on the ground that such action violates the Double Jeopardy Clause of the Fifth Amendment.<sup>2</sup>

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<sup>2</sup> The full retroactive application of *Benton*, is obscured by a conflict between footnotes in *Price v. Georgia*, 398 U.S. 323 (1970) and *Waller v. Florida*, 397 U.S. 387 (1970). Compare *Price v. Georgia*, *supra*, 398 U.S. at 330, n. 9, with *Waller v. Florida*, *supra*, 397 U.S. at 391, n. 2, citing *Ashe v. Swenson*, 397 U.S. 436, 437, n. 1 (1970).

The integrity of the fact-finding process and the accuracy of the jury's verdict were critical issues in **Benton**. **Benton** was first convicted of burglary but acquitted of larceny. An appeal resulted in a new trial. At the second trial, he was found guilty of both burglary and larceny. This Court reversed, holding the second trial for larceny after the prior acquittal violated the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. **Waller** and this case are akin to **Benton** only in that they involve the Fifth Amendment and double jeopardy. Critical differences justify the retroactivity of **Benton** but militate against the retroactivity of **Waller**. The basic difference is **Robinson** was found guilty in the municipal proceeding and then entered a voluntary plea of guilty in the State proceeding. The integrity of the fact-finding process is not at issue.

**Waller v. Florida** and **Ashe v. Swenson** are refinements of **Benton's** broad holding. They deal with two different situations which may give rise to double jeopardy questions; first, a second trial following a guilty verdict by an inferior court; second, a second trial following a not guilty verdict by a court of concurrent jurisdiction. **Ashe v. Swenson** is more akin to **Benton v. Maryland** because both cases deal with convictions following acquittals, leaving little doubt that **Ashe v. Swenson's** doctrine of "constitutional collateral estoppel" falls under the ambit of **Benton's** retroactivity rule.<sup>3</sup>

The same cannot be said for **Waller**. The common element in **Benton**, **Waller** and the instant case is the petitioner in each case faced two trials. The similarities end at this point and the cases become distinguishable. The first **Benton** jury found **Benton** not guilty of larceny. The second jury, using the same evidence, found **Benton** guilty of the same larceny charge. These contradictory verdicts

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<sup>3</sup> See also, **Harris v. Washington**, 404 U.S. 55 (1971).

on the same charge of larceny, using the same evidence, dealt an injurious blow to the integrity of the first fact-finding process and presented a serious dilemma.

It was the State's act of subjecting Benton to a second trial on the same charge for which he had been previously acquitted that the Court found so objectionable to the fundamental fairness of the American system of justice. Thus, the Court extended the Fifth Amendment provision against double jeopardy to the States, thereby overruling **Palko v. Connecticut**, 302 U.S. 319 (1937). The State's twice subjecting Benton to jeopardy was worsened by the guilty verdict at the second trial which impugned the integrity of the first fact-finding process. For this reason Benton was accorded full retroactivity. Benton is intended to eliminate an element in the criminal trial which "substantially impairs its truth finding function and so raises serious question about the accuracy of guilty verdicts in past trials . . ." **Williams v. United States**, 401 U.S. 646, 653 (1971).

Benton differs from **Waller** in this fundamental respect. Since neither **Waller** nor the instant case calls the accuracy of the first verdict into question, the Benton rationale, more closely akin to **Ashe v. Swenson**, 397 U.S. 436 (1970), should not be controlling when determining **Waller's** retroactivity.

D. The purpose of **Waller v. Florida** is to limit the States to one forum for criminal prosecutions by abrogating the "Dual Sovereignty" doctrine.

The purpose of **Waller v. Florida** is to limit the States to one forum for criminal prosecutions by abrogating the "Dual Sovereignty" doctrine which had permitted subsequent state prosecutions for offenses previously litigated in municipal courts. **Waller** did not speak concerning the validity of the procedure used to reach the result of the

second state trial; rather, it stands for the proposition that the second trial by the State subjects the petitioner to jeopardy for the second time, thus violating the Double Jeopardy Clause of the Fifth Amendment. Subsequent to **Waller**, second prosecutions are barred as a matter of public policy. The State must now prosecute the petitioner only once for the same offense.

**Waller** and the case at bar present identical situations. Each petitioner had been found guilty of violating a municipal ordinance in a municipal court, and each was subsequently tried in state court. Robinson entered a plea of guilty to the charge at his second trial. **Waller** and Robinson are not innocent men forced to stand a second trial for an offense of which they were previously acquitted, as was the case in **Benton**. They were convicted in proceedings which conformed to all then-applicable constitutional norms. **Williams v. United States**, *supra*, 401 U.S. 656. It is subjecting an individual who has been found innocent to another trial on the same charge following an acquittal by another court of equal jurisdiction that offends the American sense of justice, not the situation presented here.

Although **Waller** and the instant case do not involve subjecting an innocent man to a second trial on the same criminal charge, this Court found unconstitutional the State's successive criminal prosecutions under the "Dual Sovereignty" doctrine. It is not here contended that **Waller** does not fall within the ambit of **Benton**. As this Court stated in **Waller**:

"Here as in **North Carolina v. Pearce**, . . . **Benton** should be applied to test petitioner's conviction, although we need not and do not decide whether each of the several aspects of the constitutional guarantee against double jeopardy requires such application in similar procedural circumstances."

**Waller v. Florida**, *supra*, 397 U.S. at 390, 391.



By stating that **Benton** should be applied, the Court meant that the Double Jeopardy Clause of the Fifth Amendment should be applied to the States. However, **Benton** and **Ashe v. Swenson** involve the integrity of the fact-finding process while **Waller** involves unnecessary governmental harassment. **Benton** itself supports the position that **Waller** does not involve the integrity of the truth-finding function of a criminal trial, and therefore, should not be accorded retroactivity.

The petitioner in **Benton** requested the Court to vacate his burglary conviction although he had been tried twice on the same burglary charge and had been found guilty twice. The two trials for burglary are closely akin to **Waller** and the instant case. If the **Benton** Court had considered Benton's second trial on the burglary charge after a prior guilty verdict on the same burglary charge as substantially impairing the integrity of the fact-finding process or as violating the fundamental fairness of American justice, the Court could have vacated the burglary conviction as well. But instead, the case was remanded for an evidentiary hearing.<sup>4</sup> Such an action by the Court indicates that once an accused has been found guilty of a criminal charge, a second trial on the same criminal charge does not affect the fundamental fairness of the trial, subject to the restrictions of **North Carolina v. Pearce**, 395 U.S. 711 (1969). Thus, it appears from this Court's action on the burglary trials in **Benton** that successive criminal prosecutions under the "Dual Sovereignty" theory are not the kind of acts that significantly impair the truth-finding function of the criminal trial or violate the funda-

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<sup>4</sup> On remand, Benton's burglary conviction was reinstated and affirmed. The Court of Special Appeals of Maryland held that the record did not disclose any evidence that had been admitted at the first trial that could not have been admitted against Benton had the trial been for burglary alone. **Benton v. State**, 8 Md.App. 388, 260 A.2d 86 (1969).

mental fairness of American justice. Therefore, the abrogation of "Dual Sovereignty" should not be accorded full retroactive application.

The rule in **Waller** should be accorded the same application as suggested by this Court's decision in **Desist v. United States**, *supra*. Thus, the **Waller** rule should apply only to those cases in which the prohibited act occurred after the decision.

## II. The Abolition of the "Dual Sovereignty" Doctrine Should Not Be Extended to Those Individuals Whose Trials Took Place to *Waller v. Florida*.

In conjunction with the resolution of the "purpose" issue, the Court must also consider to whom the new constitutional rule will apply. In several cases refusing to give a new rule retroactive effect, the Court has differed concerning which parties should be affected by the new rule. This divergence of opinion has resulted in the Court's granting limited retroactivity to decisions which were basically prospective in nature. Thus in **Linkletter**, the Court extended the **Mapp** rule only to those cases on direct review at the time **Mapp** was decided:

"All that we decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based on it."

**Linkletter v. Walker**, *supra*, 381 U.S. at 639, 640.

The **Linkletter** approach was also followed in **Tehan v. United States ex rel. Shott**, 382 U.S. 406 (1966).

In **Johnson v. New Jersey**, 384 U.S. 719 (1966), the Court announced a new guideline to determine which parties would benefit from new constitutional rules announced by the Court. There the Court limited the **Escobedo** and



**Miranda** rules to cases in which the trials commenced subsequent to the announcement of those new constitutional rules. **Johnson v. New Jersey**, *supra*, 384 U.S. at 734. This rule was later amplified in **Jenkins v. Delaware**, 395 U.S. 213 (1969), which held that since cases originally commenced before **Miranda** were not within the scope of **Johnson v. New Jersey**, the **Miranda** and **Escobedo** rules did not apply to retrials of those earlier cases commenced after the date of the **Miranda** decision.

The scope of a new rule's application was again narrowed in **Stovall v. Denno**, 388 U.S. 293 (1967), where this Court held, in part, that the rule requiring the right to counsel at pretrial identifications was applicable only to those cases in which the confrontation occurred after the announcement of **Gilbert v. California**, 388 U. S. 263 (1967) and **United States v. Wade**, 388 U.S. 218 (1967). In like manner, this Court later held in **Desist v. United States**, 394 U.S. 244 (1969) that the rule excluding evidence from electronic surveillances conducted without prior judicial authorization applied only where the prohibited act occurred after the decision in **Katz v. United States**, 389 U.S. 347 (1967). **Desist** embodies this Court's present position concerning which parties will be affected by a new constitutional rule once the rule is not accorded retroactivity.

### III. The States' Strict Interpretation of This Court's Previous Decisions Construing the Double Jeopardy Clause of the Fifth Amendment Was Justified.

A. Prior to **Benton v. Maryland**, **Palko v. Connecticut** exempted the states from the coverage of the Double Jeopardy Clause of the Fifth Amendment.

It was not until **Benton v. Maryland** that the Double Jeopardy Clause of the Fifth Amendment was incorpo-

rated into the Fourteenth Amendment and thereby made applicable to the States. Prior to **Benton v. Maryland**, the Court had held in **Palko v. Connecticut** that the Double Jeopardy Clause of the Fifth Amendment was not applicable to the States. **Palko v. Connecticut**, 302 U.S. 319 (1937). The States cannot be held accountable for not meeting federal standards of double jeopardy without a clear mandate from this Court. The State's reliance on **Palko v. Connecticut** was not without reasonable basis. Thus, since Robinson's successive trials were held prior to **Benton**, the State was without notice that such successive criminal prosecutions for the same offense were unconstitutional.

B. The States' reliance on the "Dual Sovereignty" doctrine as supporting successive criminal prosecutions did not conflict with either **Palko v. Connecticut** or **Benton v. Maryland**.

Although the Tennessee Supreme Court had held that municipalities were only arms of the State,<sup>5</sup> it was well established that municipalities could enact ordinances as long as such ordinances did not conflict with the general law of the State and were reasonable. **Foreman v. City of Nashville**, 127 Tenn. 509, 156 S.W. 189 (1913). Prior to **Waller**, there was no constitutional authority stating that state courts and the courts of their municipalities would commit constitutional error by conducting successive criminal trials for the same criminal offense. In the absence of a constitutional directive to the contrary, Tennessee and other states adopted successive criminal prosecution procedures similar to those used by federal and state govern-

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<sup>5</sup> **Nashville C. & St. L. Ry. v. Marshall County**, 161 Tenn. 236, 30 S.W.2d 268 (1930).

ments.<sup>6</sup> Successive criminal prosecutions in the federal and state courts for the same criminal offense were upheld as acts of separate sovereigns in *Bartkus v. Illinois*, *supra*, and *Abbate v. United States*, *supra*. It was not unreasonable for States and municipalities to view themselves as being in a position similar to the federal-state relationship since both State and municipal governments had separate criminal provisions. The Sixth Circuit noted below that even though all States have some form of guarantee against double jeopardy [see *Mulreed v. Kroop*, 425 F.2d 1095, 1098 (6th Cir. 1970)], either constitutional, statutory, or by the common law, nearly half of them permitted multiple prosecutions by municipal

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<sup>6</sup> The Tennessee Supreme Court in *Mullins v. State*, 214 Tenn. 366, 368-369, 380 S.W.2d 201, 202 (1964), said:

"There are certain acts which constitute offenses against more than one sovereign and trial in the courts of one sovereign, of course is not a bar to trial in the courts of another sovereign. *Sizemore v. State*, 40 Tenn. 26; *Coleman v. Tennessee*, 97 U.S. 509, 24 L.Ed. 1118; *Greenwood v. State*, 65 Tenn. 567. An excellent note on this question will be found in 174 A.L.R., beginning at page 1343, where cases from many jurisdictions are annotated. In reading this annotation we find the following on page 1347, quoting from an opinion of the Supreme Court of Florida. That court said:

"Some courts have sustained this view, but the overwhelming weight of authorities, with which our views accord, support the contrary rule, that there is no impropriety, from a constitutional standpoint, in clothing our municipal governments with legislative power to prohibit and punish by ordinance any act made penal by the state laws, when perpetrated within the municipal limits; and that it is no objection to such an ordinance that it prescribes the same penalties as the state law for the commission or omission of the same act; and that the offender may be tried and punished for the same act under both the ordinance and the state law; and that a conviction or acquittal under the one is no bar to prosecution under the other; and that it is no objection to the municipal ordinance that the trial thereunder is without a jury." [*Theisen v. McDavid*, 34 Fla. 440, 16 So. 321 (1894)]

Our authorities are to the same effect."

palities and the State at the time **Waller** was decided. **Waller v. Florida**, *supra*, 397 U.S. at 391, n. 3. **Waller** simply compelled the States to abandon the long tolerated practice of successive prosecutions based on standards of double jeopardy. The States, in the absence of any clear constitutional mandate to the contrary, should not be faulted for failing to anticipate **Waller v. Florida**.

#### IV. The Impact on the Administration of Justice Is Sufficient to Warrant Denying Retroactive Application to **Waller v. Florida**.

The survey of the effect of a retroactive application of **Waller** was inconclusive. Replies from twenty-six of the fifty States are inadequate to measure the effect on the administration of justice of a retroactive application of **Waller**. Tennessee (App., pp. 21, 26) and Washington (App. 61) indicated a substantial interest in a prospective application of **Waller**. See, *e.g.* **Douglas v. Nixon**, 459 F. 2d 325 (6th Cir. 1972), *certiorari pending*, holding the present case bars relief from successive municipal-state drunk driving prosecutions. Further, in **Tehan v. United States ex rel. Shott**, *supra*, this Court refused to grant retroactive applications even though only six States would be adversely affected. The data with respect to Washington and Tennessee provide a basis for denying retroactive application of **Waller**.

A survey of State decisions since **Waller** reveals that the abrogation of "dual sovereignty" has had a demonstrable effect on the administration of justice.

**Williamson v. State**, 474 P.2d 139 (Okla.Crim.App. 1970), is typical. Williamson pleaded guilty in the Tulsa municipal court to larceny of four boxes of sparkplugs worth \$600.00. He was fined \$25.00 and sentenced to ten days in

jail. Subsequently, he was tried by the State for stealing sparkplugs from the same store on the same date. The State used the same evidence that led to conviction in the municipal court. The defendant's motion for double jeopardy was overruled and he was found guilty and sentenced to eighteen months in prison. The Oklahoma court held that the second conviction was invalid because of **Waller**. See also **State v. Stiefel**, 256 So.2d 581 (Fla. App. 1972) and **Barrett v. State**, 478 P.2d 1016 (Okl. Crim. App. 1970), holding invalid sentences imposed in state court subsequent to a municipal prosecution.

Retroactive application of **Waller** will create an anomalous situation where defendants convicted of identical offenses will receive unequal punishment merely because some individuals were also tried in municipal courts. The preceding **Williamson** case from Oklahoma demonstrates this. Had **Williamson** been tried by the State alone, his eighteen month sentence would be valid. But since he had received a nominal fine and ten-day sentence, the court was forced to release him before he had served his entire second sentence. Should **Waller** be applied retroactively, the States would be compelled to release some individuals convicted of serious crimes merely because they had been convicted of a petty offense in a lower municipal court. Justice does not demand this result. Indeed, this is a violation of the Equal Protection Clause of the Fourteenth Amendment.

In a similar case from Illinois, the defendant King was charged under municipal ordinances with (1) fighting, and (2) indecent conduct. He entered a plea of guilty to the charge of fighting on December 2, 1968; thereafter, evidence was heard on the charge of indecent conduct, and the case was taken under advisement. Subsequently, in January, 1969, the defendant was indicted by the state for deviate sexual assault. Prior to his trial in April,

1969, his motion to bar this prosecution on the grounds of double jeopardy was denied. The record reveals that on December 19, 1969, the city attorney moved to strike the "indecent conduct" cause of action for the reason that the "defendant is serving a penitentiary sentence of indecent conduct in this cause." The Illinois Appellate Court held that the defendant's subsequent conviction for deviate sexual conduct was barred because jeopardy had attached at the prior evidentiary hearing conducted by the municipal court. **People v. King**, 1 Ill.App.3d 757, 275 N.E.2d 213, 214 (1971). Accord, **People v. Allison**, 46 Ill. 2d 147, 263 N.E.2d 80 (1970).

The state courts have given **Waller v. Florida** varying interpretations in order to limit its effect. Some have held that **Waller** does not apply to different offenses arising out of the same transaction when there is a lack of "identity of offenses." **State v. Hoffman**, \_\_\_ S.C. \_\_\_, 186 S.E. 2d 421 (1972); **Cox v. State**, 208 Kan. 190, 490 P.2d 381 (1971); **State v. Conrad**, 243 So.2d 174 (Fla.App. 1971); **State v. Miller**, \_\_\_ Ore. \_\_\_, 484 P.2d 1132 (1971); and **State v. Hill**, 254 S.C. 321, 175 S.E.2d 227 (1970). Other courts have held that **Waller** will not apply to second prosecutions which require proof of additional facts. **Culberson v. State**, 247 So.2d 68 (Fla.App. 1971); **Martinez v. People**, \_\_\_ Colo. \_\_\_, 484 P.2d 792 (1971); and **State v. McDonald**, \_\_\_ Mont. \_\_\_, 491 P.2d 711 (1971). Finally, several jurisdictions have held **Waller** inapplicable to situations where the municipal court had no jurisdiction over the later charges. **People v. Taylor**, 322 N.Y.S.2d 818 (1971) and **State v. R.E.F.**, 251 So.2d 672 (Fla.App. 1971).

These cases demonstrate the States' attempts to integrate **Waller** into their precedents without greatly disrupting their judicial systems. A retroactive application of **Waller** would only serve to cause increased difficulty in the administration of justice in the several states.



**V. The Petitioner's Valid Conviction Should Be Accorded Finality and Should Not Be Overturned Needlessly.**

Robinson is collaterally attacking a valid conviction. He was found guilty of three offenses of assault and battery in violation of the municipal ordinances of Chattanooga, Tennessee. In his trial in state court he entered pleas of guilty to three counts of assault and battery with intent to commit first degree murder. His guilty plea in the state court removes any possible prejudicial effect the municipal conviction may have had on his subsequent conviction in state court. He exhausted his state post-conviction remedies and was first denied federal habeas corpus relief in **Robinson v. Henderson**, 268 F.Supp. 349 (E.D. Tenn. 1967), *aff'd*, 391 F.2d 933 (6th Cir. 1968). Here he is again raising the double jeopardy question, even though Tennessee has been told by the federal courts that its procedures were constitutional.

Robinson does not attack the validity of his conviction. He does not allege or demonstrate prejudice by successive trials in the state and municipal courts. He does not protest his innocence. This Court has recognized that "... society's legitimate concern that convictions already validly obtained [should] not be needlessly aborted..." **Jenkins v. Delaware**, 395 U.S. 213, 219 (1969). This Court has refused to apply a new constitutional rule of criminal procedure where the petitioner was unable to demonstrate actual prejudice. **Adams v. Illinois**, 405 U.S. 278 (1972). Society's legitimate concern in enforcing the state's criminal sanctions upon an admittedly guilty individual and in upholding a valid conviction should prevail in the absence of any showing of prejudice by the petitioner, especially when it appears that the petitioner's conviction satisfied every then-existing constitutional requirement.

**CONCLUSION**

For the foregoing reasons the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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The authors also acknowledge the invaluable assistance of William J. Haynes, Jr., a third year student at Vanderbilt Law School, in the preparation of this brief.





(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 300 U.S. 321, 327.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

#### ROBINSON v. NEIL, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 71-6272. Argued December 6, 1972—Decided January 16, 1973

*Waller v. Florida*, 397 U. S. 387, which bars on the ground of double jeopardy two prosecutions, state and municipal, based on the same act or offense, is fully retroactive. Pp. 2-7.

452 F. 2d 370, vacated and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which DOUGLAS and MARSHALL, JJ., joined.

THE COURT OF THE UNITED STATES  
IN SENATE  
AT WASHINGTON  
D.C.  
JANUARY 10, 1900

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 71-6272

Samuel Ed Robinson,  
Petitioner,  
v.  
William S. Neil, Warden.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Sixth Circuit.

[January 16, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1962 petitioner was tried and convicted in the Chattanooga municipal court of three counts of assault and battery in violation of a city ordinance. He was fined \$50 and costs on each count. He was later indicted by the grand jury of Hamilton County, Tennessee, which, out of the same circumstances giving rise to the municipal trial, charged him with three offenses of assault with intent to commit murder in violation of state law. The petitioner pleaded guilty to the state charges and received consecutive sentences of three to 10 years for two offenses and three to five years for the third offense. He is presently in the custody of the respondent warden of the Tennessee State Penitentiary.

In 1966 the petitioner unsuccessfully sought habeas corpus relief in state courts on the ground that the second convictions for state offenses violated his federal constitutional guarantee against twice being placed in jeopardy for the same offense. In 1967 federal courts denied a similar request for habeas corpus relief. *Robinson v. Henderson*, 268 F. Supp. 349 (ED Tenn. 1967), *aff'd*, 391 F. 2d 933 (CA6 1968). In 1970 the petitioner renewed his claims for habeas relief, basing his argu-

ments on this Court's intervening decisions in *Benton v. Maryland*, 395 U. S. 784 (1969), and *Waller v. Florida*, 397 U. S. 387 (1970). Holding that *Waller* was to be accorded retrospective effect, the District Court granted the petitioner habeas corpus relief. *Robinson v. Neil*, 320 F. Supp. 894 (ED Tenn. 1971). The Sixth Circuit reversed (*Robinson v. Neil*, 452 F. 2d 370 (CA6 1971)) and we granted certiorari to decide the retroactivity of *Waller v. Florida*. 406 U. S. 916 (1972).

The Fifth Amendment's guarantee that no person be twice put in jeopardy for the same offense was first held binding on the States in *Benton v. Maryland*, 395 U. S. 784 (1969). Our subsequent decision in *Waller v. Florida*, 397 U. S. 387 (1970), held that the scope of this guarantee precluded the recognition of the "dual sovereignty" doctrine with respect to separate state and municipal prosecutions. *Waller* involved the theft of a mural from the City Hall of St. Petersburg, Florida. The petitioner there was first tried and convicted of violating city ordinances with respect to the destruction of city property and breach of the peace. Subsequently, he was convicted of grand larceny in violation of state law involving the same theft. The Court stated:

"that the Florida courts were in error to the extent of holding that—

'even if a person has been tried in municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state courts.'" 397 U. S., at 395.

Prior to this Court's 1965 decision in *Linkletter v. Walker*, 381 U. S. 618 (1965), there would have been less doubt concerning the retroactivity of the *Waller* holding. For until that time both the common law and our own decisions recognized a general rule of retrospec-

tive effect for the constitutional decisions of this Court. *E. g.*, *Norton v. Shelby*, 118 U. S. 425, 442 (1886), subject to limited exceptions of a nature such as those stated in *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371 (1940). In *Linkletter*, the Court, declaring that it was charting new ground (381 U. S., at 628 and n. 13), held that with respect to new constitutional interpretations involving criminal rights "the Constitution neither prohibits nor requires retrospective effect." 381 U. S., at 629. *Linkletter* and succeeding cases established a set of factors for determining which constitutional rules were to be accorded retrospective and which prospective effect only.\* The District Court and the Sixth Circuit in this case applied the factors enunciated by these cases to the *Waller* holding. The Sixth Circuit held, contrary to the conclusion of the District Court, that *Waller* is not to be applied retroactively.

We do not believe that this case readily lends itself to the analysis established in *Linkletter*. Certainly, there is nothing in *Linkletter* or those cases following it to indicate that all rules and constitutional interpretations arising under the first eight Amendments must be subjected to the analysis there enunciated. *Linkletter* itself announced an exception to the general rule of retroactivity in a decision announcing that the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643 (1961), would be given prospective effect only. *Linkletter* and the other cases relied upon by the Sixth Circuit dealt with those constitutional interpretations bearing on the use of evidence or on a particular mode of trial. Those procedural rights and methods of conducting trials, however, do not encompass all of the rights found in the first eight

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\*See *Desist v. United States*, 394 U. S. 244 (1969), which carefully examined all of the cases decided since *Linkletter* and more fully enunciated the guiding criteria of those cases.

Amendments. Guarantees that do not relate to these procedural rules cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis. For the purpose and effect of the various constitutional guarantees vary sufficiently among themselves so as to affect the necessity for prospective rather than retrospective application.

*Linkletter* indicated, for instance, that only those procedural rules affecting "the very integrity of the fact-finding process" would be given retrospective effect. 381 U. S., at 639. In terms of some nonprocedural guarantees, this test is simply not appropriate. In *Furman v. Georgia*, 408 U. S. 238 (1972), for example, this Court held that in the situation there presented imposition of the death penalty was not constitutionally permissible. Yet, while this holding does not affect the integrity of the factfinding process, we have not hesitated to apply it retrospectively without regard to whether the rule meets the *Linkletter* criteria. *E. g.*, *Walker v. Georgia*, — U. S. —, 41 U. S. L. W. 3001 (July 4, 1972).

The prohibition against being placed in double jeopardy is likewise not readily susceptible to analysis under the *Linkletter* line of cases. Although the Court has not handed down a fully reasoned opinion on the retroactivity of *Benton v. Maryland*, it has indicated that it is retroactive without examination of the *Linkletter* criteria. *North Carolina v. Pearce*, 395 U. S. 711 (1969); *Ashe v. Swenson*, 397 U. S. 436, 437 n. 1 (1970). These decisions do not directly control the question of whether *Waller* should be given retrospective effect but they bear upon its disposition.

The guarantee against double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While

this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules which govern the conduct of a trial. A number of the constitutional rules applied prospectively only under the *Linkletter* cases were found not to affect the basic fairness of the earlier trial, but to have been directed instead to collateral purposes such as the deterrence of unlawful police conduct, *Mapp v. Ohio*, *supra*. In *Waller*, however, the Court's ruling was squarely directed to the prevention of the second trial taking place at all, even though it might have been conducted with a scrupulous regard for all of the constitutional procedural rights of the defendant.

We would not suggest that the distinction which we draw is an ironclad one which will invariably result in the easy classification of cases in one category or the other. The element of reliance embodied in the *Linkletter* analysis will not be wholly absent in the case of constitutional decisions not related to trial procedure, as indeed this case when contrasted with *Furman* illustrates.

In *Furman v. Georgia*, 408 U. S. 238 (1972), our mandate was tailored so as to deny to the State only the authority to impose a punishment which we held unconstitutional, without the necessity of a redetermination of the factual question of whether the offense had in fact been committed. Thus the prejudice to the State resulting from the necessity of an entire new trial because of procedures newly found to be constitutionally defective, with the attendant difficulties of again rounding up witnesses whose memories would of necessity be dimmer for the second trial than for the first, was not present. That which was constitutionally invalid could



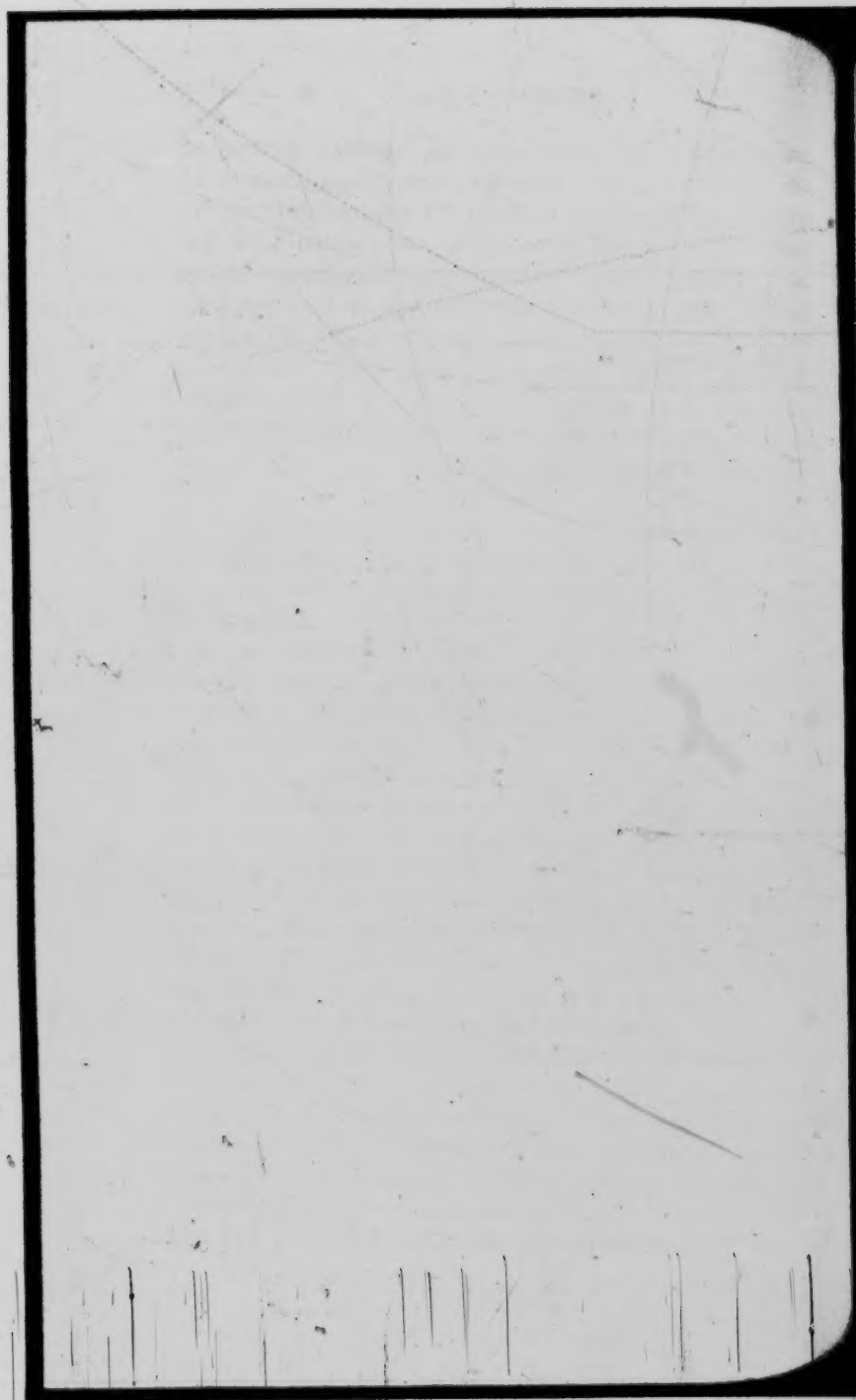
be isolated and excised without requiring the State to begin the entire factfinding process anew.

The application of *Waller* retrospectively may on the other hand result in a form of prejudice to the State, because in reliance upon the "dual sovereignty" analogy the municipal prosecution may have occurred first and the sentence already have been served prior to the commencement of the state prosecution. If the offense involved was a serious one under state law, as it apparently was in this case, the defendant may have been unintentionally accorded a relatively painless form of immunity from the state prosecution. But the Court's opinion in *Waller* makes clear that the analogy between state and municipal prosecutions, and federal and state prosecutions permitted in *Bartkus v. Illinois*, 359 U. S. 121 (1959), had never been sanctioned by this Court and was not analytically sound. Since the issue did not assume federal constitutional proportions until after *Benton v. Maryland* held the Double Jeopardy Clause applicable to the States, this Court had not earlier had occasion to squarely pass on the issue. But its decision in *Waller* cannot be said to have marked a departure from past decisions of this Court. Therefore, while *Waller*-type cases may involve a form of practical prejudice to the State over and above the refusal to permit the trial which the Constitution bars, the justifiability of the State's reliance on lower court decisions supporting the dual sovereignty analogy was a good deal more dubious than the justification for reliance which has been given weight in our *Linkletter* line of cases. We intimate no view as to what weight should be accorded to reliance by the State which was justifiable under the *Linkletter* test in determining retroactivity of a non-procedural constitutional decision such as *Waller*.

We hold, therefore, that our decision in *Waller v. Florida*, 397 U. S. 387 (1970), is to be accorded full retro-

active effect. We refrain from an outright reversal of the judgment below, however, because statements of counsel at oral argument raised the issue of whether the state and municipal prosecutions were actually for the same offense. We therefore vacate the judgment of the Court of Appeals and remand the case so that respondent may have an opportunity to present this issue there or in the District Court.

*It is so ordered.*



# SUPREME COURT OF THE UNITED STATES

No. 71-6272

Samuel Ed Robinson,  
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William S. Neil, Warden.

On Writ of Certiorari to the  
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peals for the Sixth Circuit.

[January 16, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur.

Although I otherwise join the opinion of the Court, I would reverse the judgment of the Court of Appeals "outright." I adhere to my view that, regardless of the similarity of the offenses, the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton v. Maryland*, 395 U. S. 784 (1969), requires the prosecution, except in most limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe v. Swenson*, 397 U. S. 436, 453-454 (1970) (concurring opinion); see *Grubb v. Oklahoma*, — U. S. —, — (1972) (dissenting opinion); *Miller v. Oregon*, 405 U. S. 1047 (1972) (dissenting opinion); *Harris v. Washington*, 404 U. S. 55, 57 (1971) (concurring opinion). Under this "same transaction" test, all charges against petitioner should have been brought in a single prosecution.